SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT H. DOLEMAN, DECEASED, PETITIONER,

vs.

HARRY LEVINE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from Supreme Court of District of Columbia	A	1
Caption (omitted in printing)	A	
Amended declaration	1	1
Plea in abatement	5	5
Demurrer to plea in abatement	8	6
Memorandum overruling demurrer	9	7
Stipulation as to amended declaration	9	7
Judgment	10	8
Affidavit in forma pauperis	11	9
Fiat, Cox, J.	12	10
Assignments of error	13	10
Designation of record	14	11
Clerk's certificate (omitted in printing)	16	
Proceedings in United States Court of Appeals for the District of Columbia	18	12
Argument and submission (omitted in printing)	18	
Opinion, Troner, J.	19	17
Judgment	23	18
Designation of record	24	18
Clerk's certificate (omitted in printing)	26	

JUDD & DETWEILER (INC.), PRINTERS. WASHINGTON, D. C., JANUARY 11, 1935.

—5841-C

[fols. a & b] [File endorsement omitted]

[fol. c] [Caption omitted]

[fol. 1]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

At Law. No. 83365

CHARLES M. DOLEMAN, Administrator of the Estate of ROBERT R. DOLEMAN, Deceased, Plaintiff,

vs.

HARRY LEVINE, Defendant

AMENDED DECLARATION—Filed February 6, 1934

Comes now the plaintiff, Charles M. Doleman, administrator of the estate of Robert R. Doleman, deceased, with leave of the Court first had and obtained, and files this, his Amended Declaration, as follows:

The plaintiff, Charles M. Doleman, to whom letters of administration have been issued by the Supreme Court of the District of Columbia, holding a Probate Term, upon the estate of Robert R. Doleman, deceased, and who is now the administrator of said estate and brings suit as such, sues the defendant, Harry Levine; that Robert R. Doleman, deceased, son of the plaintiff, at the time of his death, to wit, on the 3rd day of January, 1933, and for a long time prior thereto, to wit, for a period of more than five years, contributed on an average of Five ($5.00) Dollars a month to the support and maintenance of the plaintiff; that pursuant to paragraph (a), Section 933, of an Act of Congress, entitled "Longshoremen's and Workers' Compensation Act", approved March 4, 1927, and made applicable as a Workmen's Compensation Law in the District of Columbia by an Act of Congress entitled "An Act to Provide Compensation for Disability or Death Resulting from Injury to Employees in Certain Employment in the District of Columbia", and for other purposes, approved May 17, 1928, Mary E. Doleman, widow of said deceased applied [fol. 2] for, received and is receiving compensation under

an award passed by the Deputy Commissioner, United States Employees' Compensation Commission, on April 28, 1933.

That pursuant to paragraph (a) of Section 933 of said Act, the plaintiff, Charles M. Doleman, father, next of kin and dependent of Robert R. Doleman, deceased, elected to proceed against the defendant herein, Harry Levine, for the wrongful death of said deceased, and gave notice of same to the Deputy Commissioner, United States Employees' Compensation ——, said notice being given in the manner and on the forms provided by the said commission, for that heretofore, to wit, on the 3rd day of January, A. D. 1933, the death of the said Robert R. Doleman, intestate, was caused by the careless, reckless, negligent and wrongful act of the defendant, by and through his agent, servant and/or employee (hereinafter referred to as agent, servant and/or employee); the said careless, reckless, negligent and wrongful act of the defendant, by and through his agent, servant and/or employee, was such that, if the death of the said Robert R. Doleman had not ensued, would have entitled him to maintain an action against the defendant, that is to say, that about 1:20 P. M., on, to wit, the 3rd day of January, A. D. 1933, the plaintiff's intestate was engaged in his regular course of employment as an employee of the Potomac Electric Power Company, working in a manhole with his head protruding above the street, on R Street, N. E., near the intersection of Lincoln Road, N. E.; that the aforesaid manhole was protected by a caution barricade with two red flags, which said barricade surrounded the said manhole; that the said plaintiff's intestate was working in the said manhole with his back facing west on R Street, N. E.

That on the day and year aforesaid, the defendant, Harry Levine, hereinafter referred to as the defendant, was the [fol. 3] owner of a Chevrolet Sedan automobile; that the said automobile was being operated by one Harry F. Barner, agent, servant and/or employee of the defendant, in the regular course of his employment; that on the day and year aforementioned, the defendant, by and through his agent, servant and/or employee, was proceeding in an easterly direction on R Street, N. E., just east of the intersection of Lincoln Road, N. E., in the said Chevrolet Sedan automobile; and the plaintiff states that it then and there became and was the duty of the defendant, by and through

his agent, servant and/or employee operating said Chevrolet Sedan automobile at the time aforesaid, to use reasonable care and prudence in the operation of said Chevrolet Sedan automobile so as not to injure persons working in said manhole, to use reasonable care and prudence in the operation of said Chevrolet Sedan automobile so as not to run into the said caution barricade which surrounded the said manhole where the plaintiff's intestate was working, to use reasonable care and prudence in the operation of the said Chevrolet Sedan automobile so as not to run the front and rear axles of said Sedan automobile over the head of the plaintiff's intestate while he was working in the said manhole, to use reasonable care and prudence in the operation of said Chevrolet Sedan automobile so as not to endanger property or the life of any individual, and in conformity with Section 9, paragraph b, of the Traffic and Motor Vehicle Regulations in and for the District of Columbia, then and there in force and effect, as amended on February 27, 1931.

Yet, the defendant, by and through his agent, servant and/or employee, notwithstanding his duty as aforesaid, then and there carelessly, recklessly, negligently and wrongfully operated the said Chevrolet Sedan automobile [fol. 4] in violation of his aforesaid duty, to wit, the defendant, by and through his agent, servant and/or employee, drove the said Chevrolet Sedan automobile over the said manhole, into and upon the said caution barricade which surrounded and protected the said manhole; that the defendant, by and through his agent, servant and/or employee, drove the front and rear axles of the said Chevrolet Sedan automobile into, over and upon the head and upper part of the body of the plaintiff's intestate, who was working in the said manhole at the time; and the defendant, by and through his agent, servant and/or employee, operated the said Chevrolet Sedan automobile in violation of Section 9, paragraph b, of the Traffic and Motor Vehicle Regulations in and for the District of Columbia, as amended February 27, 1931, then and there in force and effect, reading as follows:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful and wanton disregard of the rights or safety of others, or without due caution and circumspection, and at a speed or in a manner so as

to endanger or be likely to endanger any person or property, shall be guilty of reckless driving."

In this, the defendant, by and through his agent, servant and/or employee, did not keep a proper lookout to ascertain what was in front of said Chevrolet Sedan automobile, did not keep the said Chevrolet Sedan automobile under proper control, that he made no effort to avoid running into the excavation barricade which surrounded the said manhole in which the plaintiff's intestate was working.

Whereby and by reason whereof, on the day and year aforesaid and while the said Chevrolet Sedan automobile owned by the defendant and operated by and through his agent, servant and/or employee was proceeding in an easterly direction on R Street, N. E., east of the intersection of Lincoln Road, N. E., the defendant did negligently, carelessly and wrongfully permit and cause his said Chevrolet Sedan automobile to run into, over and upon the [fol. 5] plaintiff's intestate, while the said intestate was working in the said manhole in the regular course of his employment on R Street, N. E., east of the intersection of Lincoln Road, N. E.; and the defendant, by and through his agent, servant and/or employee, did inflict the following injuries upon the plaintiff's intestate as a result of the aforesaid negligence: a fractured head, a punctured lung, a crushed chest and a ruptured heart; which said wounds and injuries then and there received and sustained by the plaintiff's intestate caused his death on the day and year aforesaid; and the plaintiff's intestate left surviving him his wife, Mary E. Doleman, and your plaintiff, his father, and by reason of the premises and by the law, Section 1301 of the Code of Laws of the District of Columbia (1924), an action has accrued to the plaintiff for damages to be assessed with reference to the injury resulting from the death of the plaintiff's said intestate, and they have sustained damages in the sum of Ten Thousand ($10,000.00) Dollars.

Wherefore, plaintiff brings this suit and claims of the defendant Ten Thousand ($10,000.00) Dollars damage, besides costs.

Nathan A. Dobbins, Attorney for Plaintiff, Administrator of the Estate of Robert R. Doleman.
Nathan A. Dobbins, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

PLEA IN ABATEMENT—Filed November 24, 1933

* * * * * * *

Now comes the defendant, Harry Levine, and for plea in abatement of the writ and declaration in the above entitled case says that the plaintiff's intestate, Robert R. [fol. 6] Doleman, was, on the 3rd day of January, 1933, employed by the Potomac Electric Power Company, and was engaged in the regular course of his said employment at the time of the accident complained of; that following the death of said Robert R. Doleman as a result of said accident, his widow, Mary E. Doleman, made claim for compensation against the said Potomac Electric Power Company under and by virtue of the provisions of the Act of Congress entitled "Longshoremen's and Harbor Workers Compensation Act", approved March 4, 1927, made applicable as a workmen's compensation law in the District of Columbia by an Act of Congress entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes", approved May 17, 1928; that pursuant to said claim the Deputy Commissioner, United States Employees' Compensation Commission, in case No. 26,549, entered an award on the 28th day of April, 1933, by virtue of which the said Potomac Electric Power Company, as the employer of the said Robert R. Doleman, was ordered to pay, has paid, and is paying installments of compensation to the said Mary E. Doleman; that by the provisions of said Acts of Congress, all right of the said Mary E. Doleman and the Administrator of the estate of said Robert R. Doleman to recover damages for the death of said Robert R. Doleman was transferred and assigned to the Potomac Electric Power Company; that the plaintiff in this cause has no right, interest or authority to bring this suit in his own name as administrator; and that said suit should be abated and dismissed.

And for further plea in abatement to the writ and declaration in the above entitled cause the defendant says that said cause was commenced on the 1st day of November, 1933; that subsequent to the commencement of said suit, on November 13, 1933, the Potomac Electric Power Com-

pany, in its own right and for the use of Charles M. Dole-
[fol. 7] man, administrator of the estate of Robert Dole-
man, filed its declaration and issued writ against this de-
fendant in this Court for damages for the identical tort,
alleging the death of Robert Doleman through the negli-
gence of this defendant, said suit being Law No. 83404;
that the said Charles M. Doleman, administrator as afore-
said, the use plaintiff in the latter suit, and the said Charles
M. Doleman, administrator in this suit, are the same per-
son and not other or different persons, and that the defend-
ant in the latter suit and the defendant in this suit are
one and the same person and not different persons, and
that the cause of action mentioned in the declaration in
the latter suit and the cause of action mentioned in this
suit are identical; that the latter suit seeks to collect dam-
ages for the alleged wrongful death of Robert Doleman,
by the Potomac Electric Power Company in its own right
and for the use of said Charles M. Doleman, administrator,
which is the same damages for the same alleged wrongful
death sought in this suit by Charles M. Doleman, adminis-
trator of the estate of Robert Doleman, as aforesaid; and
that said latter suit is still pending and that by reason of
the pendency of said latter suit this suit should be abated
and dismissed.

Harry Levine. Brashears & Townsend, by Edw. S. Brashears; Wilson L. Townsend, Albert F. Beasley, Attorneys for Defendant.

Duly sworn to by Harry Levine. Jurat omitted in printing.

[fol. 8] In Supreme Court of District of Columbia

Demurrer—Filed December 4, 1933

* * * * * * *

Comes now the plaintiff, by his attorney, Nathan A. Dobbins, and says the Plea in Abatement heretofore filed herein is bad in substance.

Nathan A. Dobbins, Attorney for Plaintiff.

The following points will be urged at the hearing of the above-mentioned demurrer:

1. That no valid assignment passed to the Potomac Electric Power Company by the acceptance of compensation on the part of Mary E. Doleman.

2. That the said Mary E. Doleman was not the proper person to validly exercise the right of election for the purpose of accepting compensation and binding the next of kin and persons entitled to compensation.

3. That Sections 1301 and 1302 of the District of Columbia Code have not been repealed by the Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia under act of Congress approved May 17, 1928.

4. That the Potomac Electric Power Company is estopped from maintaining any action for the wrongful death of [fol. 9] Robert R. Doleman, deceased.

5. That the Plea in Abatement shows upon its face its legal insufficiency to abate the Declaration filed herein.

6. And other matters appearing upon the face of the record.

Nathan A. Dobbins, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OVERRULING DEMURRER TO PLEA IN ABATEMENT —Filed January 27, 1934

* * * * * * *

The plaintiff's demurrer to the plea in abatement is overruled for the reasons stated in the memorandum filed this day in Potomac Electric Power Company v. Harry Levine, At Law No. 83,404.

Joseph W. Cox, Justice.

January 24, 1934.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION AS TO AMENDED DECLARATION—Filed February 6, 1934

* * * * * * *

Whereas the plaintiff has requested and obtained leave of Court to file an amended declaration in this cause for the

purpose of adding an allegation that Charles M. Doleman was a dependent of Robert R. Doleman, and the amended declaration having been filed, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that the defendant's plea in abatement, the plaintiff's demurrer to the plea in abatement and the memorandum opinion of the Court overruling the demurrer to the plea in abatement, all of which have heretofore been filed in [fol. 10] this cause, shall be taken and considered as applying to the amended declaration with the same force and effect as they applied to the original declaration.

Nathan A. Dobbins, Attorney for Plaintiff. Albert F. Beasley, of Counsel for Defendant.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

JUDGMENT—February 6, 1934

Session resumed pursuant to adjournment, Hon. Joseph W. Cox, Justice, presiding.

* * * * * * *

Upon consideration of the oral motion this day made for leave to file an amended declaration herein, it is ordered that said motion be, and the same is hereby granted, said amended declaration to be filed forthwith. Whereupon, it appearing to the Court that a stipulation was filed in this cause this day wherein it is agreed between the parties hereto that the defendant's plea in abatement, the plaintiff's demurrer to said plea in abatement and the ruling of the Court upon said demurrer shall be taken and considered as applying to the amended declaration herein, with the same force and effect as that applied to the original declaration. Further, the plaintiff now, in open Court, elects to stand upon the demurrer filed herein to the plea in abatement, and it appearing to the Court that said demurrer was overruled upon the 27th day of January, 1934, judgment is accordingly ordered.

Wherefore, it is considered that this cause stand abated; that the defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by his attorney [fol. 11] of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars ($100.00) with leave to deposite Fifty Dollars ($50.00) with the clerk in lieu thereof.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

AFFIDAVIT IN FORMA PAUPERIS—Filed February 8, 1934

* * * * * * *

1. Your petitioner in the above entitled cause respectfully shows unto the Court that he is the administrator of the estate of Robert R. Doleman, deceased; that letters of administration having been issued to him by the Supreme Court of the District of Columbia, holding a Probate Court, which said letters have not been revoked, but are still in force and effect; that the deceased left no assets, real or personal, other than a cause of action against Harry Levine for his wrongful death on the 3rd day of January, 1933, while your petitioner's intestate was working in a manhole on R Street, N. W., near Lincoln Road, in the regular course of his employment as an employe of the Potomac Electric Power Company.

2. Your petitioner, administrator of the estate of Robert R. Doleman, deceased, states that the estate owns no real or personal property other than the said cause of action above-stated; that he has been advised and believes that the appeal which has been noted in the above entitled cause is meritorious and warrants perfecting; that by reason of the fact that there is no property in the estate to pay the cost of appeal, or to give as security for said cost, he believes this court ought to permit him to proceed in prosecuting the said appeal without prepayment of costs.

[fol. 12] Wherefore, the premises considered, your petitioner prays:

That he, as administrator of the estate of Robert R. Doleman, deceased, be permitted to perfect and prosecute the appeal noted in the above entitled cause without prepay-

ment of costs and fees in the Supreme Court of the District of Columbia.

Charles M. Doleman, Administrator of the estate of Robert R. Doleman, Deceased.

Duly sworn to by Charles M. Doleman. Jurat omitted in printing.

FIAT

Let the appeal in the above entitled cause be perfected without prepayment of costs and fees in the Supreme Court of the District of Columbia.

JOSEPH W. COX, Justice.

[fol. 13] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed February 9, 1934

* * * * * * *

The errors committed by the Court are:

1. The Court erred in overruling the plaintiff's Demurrer to the defendant's Plea in Abatement, and in entering judgment for the defendant.

2. The Court erred in its construction of paragraph B of Section 933 of the District of Columbia Workmen's Compensation Act (Act of Congress approved March 14, 1927, as amended by Act approved May 17, 1928, 45 Stat. at L. 600, C. 612; U. S. C. A., Title 33, Chapter 18).

3. The Court erred in holding that the acceptance of compensation by the widow of a deceased employe under Section 933 (b) of the District of Columbia Workmen's Compensation Act transfers the cause of action for wrongful death of said deceased to the employer even though the widow is neither the administratrix nor the only next of kin of said deceased, nor sole party or dependent entitled to compensation.

4. The Court erred in holding that a dependent of a deceased employe under the said District of Columbia Workmen's Compensation Act, who has properly elected to pro-

ceed against the third party responsible for the wrongful death of the deceased employe and has become administrator for that purpose, has no right to maintain the cause of action against the said wrongdoer where the widow has accepted compensation under the said District of Columbia Workmen's Compensation Act.

5. The Court erred in holding that the acceptance of compensation under the District of Columbia Workmen's Compensation Act works as an assignment of the entire cause of action to the employer against the wrongdoer even though there is another dependent under the said Act, who is [fol. 14] also the administrator and a next of kin of the said deceased employe, and who has properly elected to proceed against the said wrongdoer.

6. The Court erred in its memoranda opinion, holding that the case of Ætna Life Insurance Company vs. Moses (287 U. S. 530) has given to the employer the right to maintain the cause of action against the wrongdoer where a person entitled to compensation has accepted same under the District of Columbia Workmen's Compensation Act.

Nathan A. Dobbins, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed February 9, 1934

* * * * * * *

Comes now the plaintiff in the above entitled case and designates the parts of the record to be included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal:

1. Amended Declaration.
2. Plea in Abatement to Amended Declaration.
3. Demurrer to Plea in Abatement.
4. Memorandum of Cox, Justice.
5. Stipulation of counsel for plaintiff and defendant.
6. Minute entry showing leave of Court to file Amended Declaration.

7. Minute entry of plaintiff's election to stand on Demurrer to Plea of Abatement as applied to Declaration as amended.

8. Judgment against plaintiff for costs and noting of appeal.

9. Affidavit of plaintiff in lieu of cost bond or cash deposit for cost on appeal.

[fol. 15] 10. Assignment of errors.

11. This Designation of Record.

Nathan A. Dobbins, Attorney for Plaintiff.

Service of a copy of the foregoing Designation of Record is hereby acknowledged this 8th day of February, A. D. 1934.

Albert F. Beasley, of Counsel for Defendant.

[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 17] [File endorsement omitted.]

[fol. 18] Minute Entry of Argument and Submission, Oct. 4, 1934, omitted in printing.

[fol. 19] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6210

(Argued October 4, 1934. Decided November 5, 1934)

CHARLES M. DOLEMAN, Administrator of the Estate of Robert H. Doleman, Deceased, Appellant

v.

HARRY LEVINE, Appellee

Appeal from the Supreme Court of the District of Columbia

Before Martin, Chief Justice, and Robb, Hitz, and Groner, Associate Justices.

Nathan A. Dobbins, of Washington, D. C., for appellant.

Edward S. Brashears, Wilson L. Townsend, and Albert F. Beasley, of Washington, D. C., for appellee.

OPINION

GRONER, Associate Justice:

On January 3, 1933, Robert H. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in one of the streets of Washington City, was struck by an automobile owned by Harry Levine—an alleged third party wrongdoer—and sustained injuries from which he died that day. Doleman left surviving, his widow, Mary E. Doleman, his father, Charles M. Doleman, and a brother, as his heirs at law and next of kin.

The widow elected to receive compensation from the power company, Doleman's employer, under the District of Columbia Compensation Act (Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A., 901, et seq.). The dependent father elected not to receive compensation, and as administrator instituted an action under the wrongful death statute to recover against Levine. On the 13th day of November, the power company (the employer) likewise brought an action against Levine (sec. 33 (d)).

In the suit of the administrator, Levine filed a plea in abatement setting forth and alleging the pendency of the two actions and also that the cause of action, if any, to recover for Doleman's death was assigned by the terms of the Compensation Act (the election of the widow) to the employer, and that the action of the administrator was not maintainable. The administrator demurred to the plea, [fol. 20] and the court below overruled the demurrer and entered judgment for the defendant. From that judgment this appeal is taken.

The appeal involves the construction of section 33 of the act or, stated differently, who is the proper party plaintiff in an action against a third party wrongdoer under the facts shown above? Here it is insisted on behalf of the administrator that the widow, by accepting compensation, cannot transfer the entire cause of action to the employer so as to give the employer the exclusive right to maintain the action; that since the Compensation Act gives the right of election severally, the action of one of the beneficiaries is not binding on the other.

In the interest of clarity, we set out in full the applicable paragraphs of section 33.

"Sec. 33. (a) If on account of a disability or death for which compensation is payable under this act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) *Such* employer on account of *such* assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such

compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

[fol. 21] The employer shall pay any excess to the person entitled to compensation or to the representative.

* * * * * * *

"(h) The deputy commissioner may, if the person entitled to compensation under this act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election."

In substance, appellant asks us to construe the assignment provisions of section 33 as confined (a) to a case where the employee survives and accepts compensation, or (b) where in the event of death there is no person entitled to compensation under the act (see section 44). In other words, appellant would read subsection (a) of 33 as giving to the injured person the right to accept compensation or to recover damages against a third person, and subsection (b) as vesting in the employer, in the event of such election, the right to recover damages from the third person, and he would restrict the benefits of the assignment provisions of (d) to cases where there is no person entitled under the act to compensation and where, as is required under (c), the employer pays $1,000.00 into a fund created by the act.

As the Supreme Court said in the Ætna case, to which we shall presently refer, the statute is not free from ambiguity. Subsections (c) and (d) undoubtedly vest in the employer the absolute right to recover damages in the case in which there is no person entitled under the act to receive compensation, where the employer has complied with section 44. If the words in (d) "such assignment" be confined to the conditions named in (c) and not made applicable to (b) there would be strong ground for the position appellant takes; and it may very well be argued that if the Congressional intent had been to make the assignment apply equally under the different conditions of the two subsections it would have been provided for by using the words "such assignments"; but, having regard to the general purpose of the act, we think it can be fairly concluded Congress intended to vest an actionable assignment in the em-

ployer, as well in cases where injury results in death, as where the employee survives and accepts compensation, for in either case the employer is required to make specific payments, and when made, the undeniable purpose of the assignment provision is to secure reimbursement where the injury or death is due to the wrongful act of a third person.

If, therefore, it should be held that, in a case of death, where one beneficiary elects to receive compensation and another not to, the employer's exclusive right to bring the action is lost, the result would be either that the employer's right to reimbursement would be denied or the third party would be subjected to two separate and independent suits for the same cause of action. The most casual reading of the act necessarily excludes either of these assumptions. And this, as we think, was the conclusion reached by the Supreme Court in Ætna Life Insurance Company v. Moses, 287 U. S. 530. In that case, which went from this court, the facts briefly, were these:

An employee of a building contractor, while in the performance of his work, was killed through the negligence of a third party. His widow filed a claim under the Compensation Act and an award of compensation, to be paid by [fol. 22] the employer, was duly made. The widow was thereafter appointed administratrix of the estate of her deceased husband, and an action was begun against the third party by the insurance carrier of the employer in its own name. We held that under the provisions of the District of Columbia laws the administratrix was the proper party plaintiff (57 F. (2d) 440).

The Supreme Court took a different view and, while conceding that 33 (b) of the act, read literally, would in a wrongful death case give the employer nothing, since the person whose rights were assigned would have no right as such to recover for the death, nevertheless held that, read in connection with succeeding sections, the purpose was to give the employer the same control over an action for wrongful death and the distribution of the proceeds as in a case where the injury resulted only in disability. In this view, it is clear that the effect of the decision is to hold that the act gives the employer the right to sue in his own name the third party wrongdoer wherever the beneficiaries under the act accept compensation, and we think, by the same reasoning, where only part of the beneficiaries accept

compensation, for the court also says (page 540): "Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act, we do not think, as did the courts below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative."

In the facts here, the employer, having paid compensation to the widow, under the provisions of the act is entitled to recover the amount paid. We think this is perfectly clear and, if it be granted, it follows inevitably that in the light of the above quoted language of the Supreme Court the right to recover part is the right to recover all. If any other rule is adopted, it will lead to the confusion, expense, or the injustice, we have already pointed out. On the other hand, in construing the statute to recognize the employer's exclusive right to bring the action where *any* beneficiary elects to take compensation, we have a case of hardship to no one, for there is specific provision in the act for distribution to the personal representative of the excess of the recovery, the employer sharing only to the extent of his own liability.

Affirmed.

A true copy. Test:

——— ———, Clerk, United States Court of Appeals for the District of Columbia.

[fol. 23] IN UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

October Term, 1934

No. 6210

CHARLES M. DOLEMAN, Administrator of the Estate of Robert H. Doleman, Deceased, Appellant,

vs.

HARRY LEVINE

Appeal from the Supreme Court of the District of Columbia

JUDGMENT—November 5, 1934

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed.

Per Mr. Justice Groner.

November 5, 1934.

Mr. Justice Van Orsdel took no part in the consideration or decision of this case.

[fol. 24] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed Nov. 8, 1934

The Clerk in the preparation of the transcript of record on Petition for Certiorari to the Supreme Court of the United States will include the following papers and proceedings:

1. The Transcript of Record.
2. The Minute Entry of the Argument.
3. Opinion of the Court.
4. Judgment.
5. This Designation.
6. Clerk's Certificate.

Nathan A. Dobbins, Attorney for Plaintiff in Error.

[fol. 25] [File endorsement omitted.]

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 39,202. District of Columbia, U. S. Court of Appeals, Term No. 574. Charles M. Doleman, Administrator of the Estate of Robert H. Doleman, Deceased, Petitioner, vs. Harry Levine. Petition for a writ of certiorari and exhibit thereto. Filed December 13, 1934. File No. 574, O. T., 1934.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6122-C)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

No. 574

CHARLES M. DOLEMAN, AS ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE, AN INDIVIDUAL,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF [illegible] AND BRIEF IN SUPPORT THEREOF

[illegible]

INDEX.

Subject Index.

Petition for a Writ of Certiorari:	Page
Statement	2
Questions of law presented	4
Reasons for granting the petition	6
Conclusion	9

Table of Cases Cited.

Ætna Life Ins. Co. v. Moses, 287 U. S. 530	2, 4, 6, 7
Charleston Corp. v. Sinclair, 264 U. S. 543	9
Neubeck v. Lynch, 37 App. D. C. 576	5
Washington Ry. & Electric Co. v. District of Columbia, 56 App. D. C. 134	9

Appendix.

District of Columbia Workmen's Compensation Act:	
Sec. 909	17
914 (m)	17
932 (a)	17
933 (a), (b), (c), (d), (e), (f), (g)	18
Code, D. C., Sec. 1301-1302-1303	20
Sec. 29, Chapter 67, New York Compensation Law	21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE, AN INDIVIDUAL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles M. Doleman, Administrator of the Estate of Robert R. Doleman, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in the above entitled cause (Docket No. 6210) entered on November 5, 1934 (R. p. 17), affirming an order and judgment of the Supreme Court of the District of Columbia.

Statement.

This case involves the construction and interpretation of Section 33 (a), (b), (d), (e), (f), and (g) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424), as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), and the application of the decision of the Supreme Court of the United States in the case of the

Ætna Life Insurance Co. v. *Moses*, 287 U. S. 530.

The case arises upon an appeal from an order of the Supreme Court of the District of Columbia overruling the demurrer of the petitioner herein to the respondent's plea in abatement and a judgment entered in favor of the respondent upon the petitioner's election to stand upon his demurrer. The parties will be hereinafter designated as plaintiff and defendant.

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, and his father, Charles M. Doleman, as his dependents and next of kin under the Compensation Act and the death statute.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now

receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, both as administrator and dependent of the said deceased employee, filed an election under the Compensation Act to proceed against the third party (Harry Levine), for the wrongful death of Robert R. Doleman.

On November 1, 1933, Charles M. Doleman, as the Administrator of the Estate of Robert R. Doleman, filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant acting by and through an agent, servant, and employee negligently caused the death of Robert R. Doleman, and sought damages in the amount of Ten Thousand Dollars ($10,000) therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer"), filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant, and employee, negligently caused the death of Robert R. Doleman, and sought damages in the sum of Ten Thousand Dollars ($10,000) therefor.

The defendant, Harry Levine, filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action

alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The administrator and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the court. The court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the plaintiff's action. The opinion of the Supreme Court of the District of Columbia was published in 62 W. L. R. 77.

An appeal was taken to the United States Court of Appeals for the District of Columbia; the appeal was argued in said court on October 4, 1934; and on the 5th day of November, 1934, the United States Court of Appeals entered judgment affirming the aforesaid judgment of the Supreme Court of the District of Columbia; and rendered an opinion wherein it was held that the action is maintainable only by the employer in accordance with the provisions of Paragraph (b) of Section 933 of the District of Columbia Workmen's Compensation Act (U. S. C. A. Title 33, Chapter 18) (R. p. 12).

Questions of Law Presented.

(1) What is the proper construction of Section 33 (a) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424) as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), where one dependent elects both as administrator and dependent to sue third party wrongdoer while the other dependent elects to receive compensation?

(2) What is the proper application of the decision in the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530?

(3) Can the rights vested in dependents who elect not to receive compensation under Section 33 (a) of the said Longshoremen's and Harbor Workers' Compensation Act be nullified by those dependents who elect to receive compensation under the said Act?

(4) Who is the proper party to make the election referred to in Section 33 (a) of the said Longshoremen's and Harbor Workers' Compensation Act?

(5) What are the rights, first, of the person entitled to compensation who elects to sue third party wrongdoer; and, secondly, of the person entitled to compensation who elects to receive said compensation?

(6) What are the rights of the personal representative of the deceased?

(7) Where the employer is given the right to maintain the action against third party wrongdoer, what is the proper distribution of the excess after reimbursement mentioned in Section 33 (e), (2) of said Act? Is this excess distributable among the next of kin or the dependents of the deceased employee?

(8) If the employee maintains the action against the third party wrongdoer, must the declaration set out the next of kin of the deceased as required under the decision of *Neubeck* v. *Lynch*, 37 App. D. C. 576, or must it be confined to dependents under the Compensation Act who may not be next of kin under the death statute?

(9) Has the said Compensation Act repealed the death statute of the District of Columbia, where third party wrongdoer is liable for the death of a deceased employee, so far as the rights of the next of kin of the deceased are concerned?

Reasons for Granting the Petition.

(1) The case here presented is one of great importance and relates to the construction of Section 33 (a), (b), (d), (e), (2), (f) and (g) of the said Longshoremen's and Harbor Workers' Compensation Act. The question which arose upon the plaintiff's demurrer to the defendant's plea in abatement involves procedural and substantive rights going to the very basis of all actions to recover damages for wrongful death where some of the dependents under the Compensation Act elect to sue third party wrongdoer while other dependents elect to receive compensation. It also involves the proper application of the *Ætna Life Insurance Co.* v. *Moses,* 287 U. S. 530. This is unquestionably true in view of the fact that both of the courts below applied the *Ætna* case in their opinions.

(2) The decision of the court below holding that the acceptance of compensation by one dependent transfers the entire cause of action to the employer irrespective of the rights of those dependents who elect to sue third party wrongdoer, not only works a great hardship upon these dependents but is in the very teeth of Section 33 (a) of the said Act. It in substance places the right of election in the hands of the first dependent to accept compensation.

(3) The decision of the lower court misconceives the proper interpretation of Section 33 (a) of the said Act in that it states (R. p. 16): That should the employer be denied the right to maintain the action such employer would be denied his right of reimbursement.

The decision fails to observe that where all of the dependents elect to sue third party wrongdoer under Section 33 (a) of said Act, and recover judgment the employer is denied his right of reimbursement. It also failed to recognize the fact that under the statute of distribution of the

District of Columbia the administrator would be compelled to distribute one half of any recovery to the widow (Section 376, District of Columbia Code) which amount would go to the employer per his assignment.

(4) Grave doubt has arisen in the District of Columbia with respect to the proper application of the case of the *Ætna Life Insurance Co.* v. *Moses,* 287 U. S. 530; and it is respectfully urged that an expression from the Supreme Court of the United States, as to whether or not the said case should be restricted to the facts contained in that case, would dispel all doubts that now exist in this wise.

(5) Confusion will continue to arise in all cases where third party wrongdoer is liable for the death of deceased employee, unless an expression is obtained from the Supreme Court of the United States concerning the following questions:

(A) How should the excess referred to in Section 33 (e) (2) of said Act be distributed after reimbursement?

(a) Should the dependents under the Compensation Act who elect not to receive compensation, be the sole distributees of this excess?

(b) Or should dependents who elect to receive compensation be included as distributees?

(c) Can the next of kin of the deceased share in the excess, if so, to what extent?

(B) If the administrator maintains the action against third party wrongdoer, should the distribution be made to the next of kin or to the dependents of the deceased?

(C) If the action is brought by the employer, should he comply with the death statute which makes it mandatory that only next of kin be alleged as beneficiaries,

or should he defy the death statute and include only those who are dependents within the meaning of the Compensation Act?

It is believed that an expression from the Supreme Court of the United States with regards to the questions raised in this petition would go a long way toward settling much of the confusion that now exists in the District of Columbia, in so far as the rights under the death statute and the Compensation Act are concerned.

(6) Are the rights of next of kin under the death statute to be abrogated where third party wrongdoer is liable for wrongful death of deceased employee?

It was assumed without argument in the *Ætna Life* case (*supra*) by counsel for petitioner and respondent that the Compensation Act transferred the rights of the next of kin under the death statute to the dependents of the deceased employee where a third party is liable in damages for the wrongful death of a deceased employee. Counsel for petitioner in the instant case cannot concur in this admission. On page 541 in the decision of the *Ætna* case (*supra*) the Court said:

> "It is immaterial whether the statutory assignment is said to create a new cause of action in the employer or merely to permit him to enforce that previously vested in the employee or his personal representative. What is material, is, that the employer acquires the legal rights of the employee or the personal representative, subject to the qualifications imposed by the common law or the death statute to the extent that they are not inconsistent with the provisions of the Compensation Act. The Compensation Act permits him to enforce them in his own name."

What do we gather from this expression of the Court? It is reasonable to conclude that the Court took the position

that the employer took the legal rights of the personal representative of the deceased, subject to the qualifications imposed by the common law or death statute, so long as those rights so acquired are not inconsistent with the Compensation Act, but so long as those rights which are sought to be acquired by the employer conflict with the Compensation Act those rights remain the vestages of the common law or the death statute. Section 33 (c) of the Compensation Act states in effect that where there is no one entitled to compensation under the Act, the employer succeeds to all of the rights of the legal representative of the deceased employee to maintain the action, but after the employer has reimbursed himself to the extent of the One Thousand Dollars ($1,000.00) paid in the sinking fund as provided under Section 44 of the Compensation Act, he must turn over the excess recovered to the said personal representative. There is no other provision in the Compensation Act that attempts in any manner to abrogate the rights of the next of kin. The law is well settled on the question that a subsequent statute does not repeal an antecedent statute by implication; see

Washington Ry. & Electric Co. v. *District of Columbia*, 56 App. D. C. 134.

Charleston Corp. v. *Sinclair*, 264 U. S. 543.

WHEREFORE, your petitioner respectfully prays: That a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and sent to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No, 6210, *Charles M. Doleman*, Administrator of the Estate of Robert R. Doleman, v. *Harry Levine*, and that the judgment of the

United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may seem meet and just, and your petitioner will ever pray.

CHARLES M. DOLEMAN,
Administrator of the Estate of Robert R. Doleman.
By NATHAN A. DOBBINS,
JAMES C. WATERS, JR.,
OTHO D. BRANSON,
Counsel for Petitioner.

INDEX.

Subject Index.

Brief in Support of Petition for Writ of Certiorari:	Page
Opinions of courts below	1
Jurisdiction	1
Statement	2
Argument	2
Conclusion	16

Table of Cases Cited.

Ætna Life Ins. Co. v. Moses, 287 U. S. 530	13
Betts v. Southern Ry. Co., 71 F. (2d) 787	9
Carpo v. City of Syracuse, 183 N. Y. 395	3
Jannicky, In re, 209 N. Y. 413	5
Neubeck v. Lynch, 37 App. D. C. 576	13
Plumstead Board of Works v. Spackman, L. R. 13, Q. B. D. 878	15, 16
U. S. Fidelity & Guaranty Co. v. Graham & Norton Co., 254 N. Y. 50	7, 15
Zirpola v. Casselman, 237 N. Y. 367	6, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE, AN INDIVIDUAL.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The memorandum opinion filed in the Supreme Court of the District of Columbia is reported in 62 W. L. R. 77.

The opinion of the United States Court of Appeals for the District of Columbia was rendered November 5, 1934 (R. p. 12), and is not as yet reported.

II.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on the 5th day of November, 1934.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 231, Sec. 240, 36 Stat. 1157; C. 229, Sec. 1, 43 Stat. 938), and Paragraph (c) of Section 5, of Rule 38 of the United States Supreme Court, 286 U. S. 624.

III.

Statement.

A statement of the facts and the questions involved will be found in the petition for a Writ of Certiorari.

IV.

Argument.

(A) Much of the confusion that has arisen, where third party wrongdoer is responsible for the wrongful death of a deceased employee, is due largely to the fact that the Compensation Act uses in Section 33 (a) of said Act the term "person entitled to compensation."

In the instant case the plaintiff is the administrator of the estate of the deceased employee; and also a person entitled to compensation under the Compensation Act and a next of kin within the meaning of the death statute of the District of Columbia. On the other hand the widow of the deceased employee is a person entitled to compensation under the Act and a next of kin within the meaning of the death statute of the District of Columbia.

The plaintiff elected to recover damages against the defendant; and this election was made in his capacity as the administrator and also in the capacity of a person entitled to compensation. The widow accepted compensation. It is well settled that no cause of action existed against the defendant for his alleged negligence resulting in the death

of the employee except the one given under the death statute. The Code action (Section 1302 of the District of Columbia Code) is given to the representative of the estate of the deceased and not to the widow and next of kin. The cause of action does not accrue until the appointment of an executor or an administrator: See

Carpo v. *City of Syracuse*, 183 N. Y. 395.

It is insisted by the petitioner that the question of "election" should have been disposed of by the deputy compensation commissioner before the award of compensation was made. The adoption of this practice would give assurance of an equitable distribution of the amounts receivable under both statutes. Even though the above practice was not employed in the instant case, the failure so to do on the part of the deputy compensation commissioner does not in the least assuage the position taken by the petitioner in making the election to recover damages against the defendant. It is true that the said Compensation Act is ambiguous; yet, there is sufficient clarity embraced therein to support the petitioner's right to make the said election. Section 33 (a) provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

Here we have under this section of the said Act two separate and distinct classes of injuries. The first, "if on account of a disability," and the second, "or death." Bearing in mind these two distinct classes of injuries let us

see; do we find their sequences in Section 33 (f) and (g) of said Act? The provisions of the said paragraphs are as follows:

> (f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person."
>
> (g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

In Section 33 (f) we also have two distinct parties; first, "the person entitled to compensation" and, second, "the representative." In Section 33 (g) we again have two distinct parties; first, "the person entitled to compensation," and, second, "the representative."

What does this suggest? Does it not say in so many words that in case of disability the injured employee has the right of election and in case of death the personal representative of the deceased employee has the right of election. Is it not apparent that the compromise referred to in 33 (g) means that where the employee is injured he is given the right to compromise; but where the injury results in the death of the employee the personal representative is given the right to compromise the action?

Here it must be conceded that the Congress of the United States intended that the personal representative of the de-

ceased employee (administrator) should have the right of election where all of the persons entitled to compensation do not agree to accept compensation. In fairness and justice to all parties concerned, the administrator is the logical person to make the election under the circumstances.

(B) What are the rights of the next of kin of the deceased employee who are not also dependents?

A grave injustice will be dealt a distinct group or class of people in the District of Columbia if the decision of the Court below is to stand. Section 1303 of the District of Columbia Code provides that the amount recoverable against the party liable for the wrongful death of the deceased shall be distributed according to the statute of distribution of the District of Columbia; the decision of the lower Court deprives this class from participating in the proceeds of the estate of the deceased.

The Compensation Act was not designed to destroy vested rights created by the death statute; the Compensation Act created new rights and imposed new obligations unknown to the common law. Under the Compensation Act the class of beneficiaries may be entirely different from that created under the death statute. An illegitimate child of a deceased male employee, under eighteen years of age, may be beneficiary under the Compensation Act; but such child cannot be a next of kin under our statute of distribution. The only reference in the Compensation Act which would indicate the least infringement upon the rights of the next of kin is contained in Section 33 (c) of the said Act which gives the right of action to the employer—provided he pays One Thousand Dollars ($1,000.00) into the sinking fund referred to in Section 44 of the said Act. But, even this section does not make it impossible for such next of kin to share in the distribution. See *In the Matter of Jannicky*, 209 N. Y. 413.

Some of the evils that may be perpetrated if the decision of the lower Court be not reversed are as follows:

(1) Suppose the deceased employee leaves surviving him an illegitimate dependent child, sixteen years of age, and a legitimate child, eighteen years of age; the illegitimate child by accepting compensation transfers the entire cause of action to the employer irrespective of the rights of the legitimate child.

(2) Suppose the deceased employee left surviving him five children by a now deceased wife, varying in ages from eighteen to twenty-seven years of age and also a common law wife. Under the decision of the Court below, the five children would be precluded from sharing in the distribution of their father's estate by wrongful death because when the common law wife accepts compensation, the entire cause of action passes to the employer.

It is most difficult to perceive of a legislative intent bent upon such an inequitable and unjust result.

(C) What are the rights of dependents under the Compensation Act who give notice of their intentions to recover damages against third party wrongdoer?

The question here presented is identical with the question presented to the New York Court of Appeals at the time of the decision in the case of *Zirpola* v. *Casselman*, 237 N. Y. 367, which will be discussed hereinafter. What was the condition confronting dependents under the New York Compensation Act (See appendix, *Infra* pp. c, d), who elected to sue third party wrongdoer while other dependents elected to obtain compensation? The dicta indulged in by the court in the case of *Travelers Insurance Company* v. *Padula Co.*, 224 N. Y. 397, created the impression that the employer was given the right to maintain the action against the third party wrongdoer where any of the dependents

under the Act accepted compensation; but the Court of Appeals of New York in the case of *Zirpola* v. *Casselman*, 237 N. Y. 367, speaking through Mr. Justice Cardozo said, p. 375:

> (1) "If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier who may sue or compromise at will."
>
> (2) "If dependents electing to assign are members of the class of next of kin, but not all members of that class, their assignment will be affective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary must prosecute through the administrator as the statutory trustee, and may compromise or release it."
>
> (3) "If dependents who are next of kin elect not to assign, but retain their cause of action, they retain it with all of the incidents prescribed by the laws of its creation."
>
> (4) "These dependents who are not next of kin and who are, therefore, without beneficial interest in the cause of action against the wrongdoer, are not put to an election since they have nothing to elect."

The above decision lays down a liberal and equitable rule; a rule that guarantees the next of kin as well as dependents who elect not to assign their cause of action, the equal protection of the law. The question arose in New York again in the case of *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 50, where the court spoke as follows:

> "Edward Streeter died as a result of an accident arising out and during the course of his employment alleged to be due to the negligence of another not in the same employ. He left a widow and six children. Five of the children were included in the group of dependents under the age of 18, who, with the widow, came

under the protection of the Workmen's Compensation Act (Consol. Law C. 67). The sixth child, although belonging to the group of next of kin, did not come within the group of dependents protected by the Workmen's Compensation Law. The widow and five children, as was their right, elected to accept compensation rather than to pursue the statutory remedy through the appointment of an administrator against the alleged wrongdoer. They received an award which has been paid. The result was an assignment to the insurance carrier of their beneficial interest in such cause of action. The insurance carrier thereupon brought this action in its own name and right against the alleged wrongdoer to recover the interest of the widow and dependent children, only in such a recovery as an administrator might have secured had one been appointed and instituted suit."

Held:

"The authority of the Zirpola case is not impaired by the later decision in the *Staten Island Case* (251 N. Y. 127, 167 N. E. 194). The action should have been brought through an administrator as the statutory trustee of the entire group of beneficiaries. If dependents electing to assign are members of the class of next of kin, but not all of the members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary, must prosecute through the administrator as the statutory trustee, and may compromise or release its own interest, but no other."

Not only do the New York cases give the right of action to the administrator where some of the dependents elect to sue third party wrongdoer, but Section 33 (a) of the Longshoremen's and Harbor Workers' Compensation Act expressly reserves this right to dependents who desire to elect to sue third party wrongdoer. The said section provides as follows:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy comissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

In the case of *Betts* v. *Southern Ry. Co.*, 71 F. (2d) 787, decided on June 11, 1934, by Justice Parker of the Fourth Circuit, it was held that where the administrator had sued for the wrongful death of an employee by a third party wrongdoer and the widow accepts compensation subsequently, that such acceptance of compensation does not give the employer the right to be substituted as party plaintiff against the third party wrongdoer.

From the above decision it may be seen that the modern trend is for the adoption of the rule laid down by the New York Court of Appeals (237 N. Y. 367, 254 N. Y. 50) hereinbefore discussed in this brief.

It is fundamental that words employed in a statute must be given their plain and ordinary meaning. Section 33 (a) of the Act only transfers to the employer the right of dependents accepting compensation. This section does not transfer the entire cause of action to the employer because if Congress had intended such transfer it would have used the term "all of the rights of the personal representative of the deceased" instead of employing the term "all of the rights of the person entitled to compensation."

This contention is borne out by the usage of the term in Section 33 (c) where we find the following:

> "The payment of such compensation into the fund established in Section 944 of this chapter shall operate as an assignment of all of the rights of the personal representative of the deceased."

It is clear from the very language of the act that Congress intended to reserve to those dependents who elected to sue third party wrongdoer their cause of action. It is inconceivable to think that Congress would guarantee dependents a cause of action and then deny them the right to assert that cause of action. The rule laid down by the New York Court of Appeals giving the administrator the right to maintain the action where all of the dependents do not elect to receive compensation secures to every class of beneficiaries both under the death statute and compensation law the just and equal shares that the law created for them.

(D) The decision of the United States Court of Appeals for the District of Columbia imposes a burden upon dependents, electing not to assign their cause of action to the employer.

It is noted that in the opinion of the United States Court of Appeals for the District of Columbia (R. p. 16) the following proposition of law is laid down:

> "If, therefore, it should be held that, in a case of death, where one beneficiary elects to receive compensation and another not to, the employer's exclusive right to bring the action is lost, the result would be either that the employer's right to reimbursement would be denied or the third party would be subjected to two separate and independent *suits for the same cause* of action."

A casual reading of Section 373 *et seq.* of the statute of distribution of the District of Columbia and the Compensation Act will unearth the fallacy reached in the above conclusion by the court. Upon what proposition of law or reason does the Court below predicate its conclusion with respect to the employer's denial of reimbursement? It must be conceded without argument, that should all of the persons entitled to compensation elect to sue third party

wrongdoer, the employer is not only denied the right of reimbursement, but is also liable to the persons entitled to compensation for any deficiency that exists between the amount of the judgment obtained and the amount the persons entitled to compensation are entitled to receive under the Compensation Act. Now let us assume for the purpose of the argument, that in the case at issue the administrator is given the right to maintain the action against the defendant. How would this affect the right of the employer to reimbursement? Certainly it cannot be argued that Congress intended the employer to be reimbursed as against those dependents who do not assign their cause of action to the employer. Is it not logical and reasonable to conclude that the employer is entitled only to the proportionate share of the dependent who elected to receive compensation? What, then, is the right of such employer and how is he to receive his reimbursement? The plaintiff, as administrator, would be required under the statute of the District of Columbia to make distribution in the following manner: The cost of administration, including a reasonable attorney's fee; then distribute the balance, one-half to the employer per his assignment and one half to himself, since he is also the only next of kin of the deceased; see Sections 376 and 380 of the District of Columbia Code.

However, the argument does not stop here. If we would consider the converse of the proposition, enunciated above, what would be the amount receivable by the plaintiff, should the employer be given the right to maintain the action? Assume that in the event the plaintiff, as administrator, is given the right to maintain the action and he recovers a judgment against the defendant in the amount of Seventy-Five Hundred Dollars ($7500.00). On this basis, if the employer is given the right to maintain the action, your petitioner who elected not to assign his cause of action would receive approximately Four Hundred and Ninety-

Two Dollars ($492.00); while the employer would receive approximately Sixty-Five Hundred Dollars ($6500.00). On the other hand, if the administrator is given the right to maintain the action and recovers judgment against the defendant in the sum of Seventy-Five Hundred Dollars ($7500.00), the employer would receive approximately Twenty-Seven Hundred Dollars ($2700.00) while the administrator would receive an equal amount.

Section 33 (e) (1) (A) (B) and (C) provides as follows:

> (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to:
>
> (A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).
>
> (B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.
>
> (C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and—

It is because of the hardship which the reimbursements, mentioned in the above section, would work upon those dependents who elected not to assign their cause of action, that we insist Congress could not have intended to give the right of action to the employer in the instant case.

> (E) Should the employer maintain the action against third party in the instant case? What should be the proper distribution of the excess after reimburement?

Section 33 (2) of the said Compensation Act provides:

> "The employer shall pay any excess to the person entitled to compensation or to the representative."

It is to be observed that this section does not provide whether the person entitled to compensation or the representative shall distribute the excess received by him to the next of kin, or dependents who elected not to assign or whether such excess is to be retained by him. Naturally the question arises with respect to what is the proper distribution of the excess referred to in Section 33 (2) of the said Act.

If the person entitled to compensation is to make the distribution according to the statute of distribution in the District of Columbia, he cannot make said distribution as such, but must qualify as administrator before said distribution can be made. If the personal representative is to make the distribution; to whom should he make such distribution? Under the statute of the District of Columbia he is limited in making distribution to the next of kin of the deceased.

In considering the right of the employer to maintain the action against third party, we cannot overlook the question as to how should the declaration be drawn. The decision of the United States Court of Appeals for the District of Columbia in *Newbeck* v. *Lynch*, 37 App. D. C. 576, holds that in an action for wrongful death the next of kin of the deceased must be named in the declaration. Should the dependents who assign their cause of action to the employer be not also next of kin of the deceased? Grave doubt must arise as to how the action could be maintained by the employer since the said Compensation Act fails to provide the mode of procedure where the employer sues the third party wrongdoer.

(F) The United States Court of Appeals erred in its application of the *Ætna Life Case*, 287 U. S. 530.

The facts in the *Ætna Life* case (*supra*) differ materially from the facts in the case at isue. In the *Ætna Life* case the widow was the only person entitled to compensation and the administratrix of the estate of the deceased. Under such circumstances there could be no question concerning her right to transfer the entire cause of action to the employer. This conclusion was also reached in the case of *Travelers Ins. Co.* v. *Padula Co.* 224 N. Y. 397. Mr. Justice Stone speaking in the *Ætna Life* case (*supra*), pages 538, 539 said,

> "The election to accept compensation was made by the widow *as she is both the administratrix and the only person entitled to compensation*, the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances."

The very language used by the learned Justice from the very outset clearly shows that the *Ætna Life* case (*supra*) must be limited to the facts contained in that case. The facts in the present case however show that the plaintiff is the administrator of the estate of the deceased; that he is a dependent under the Compensation Act who elected to sue third party wrongdoer; and that he is a next of kin within the meaning of the District of Columbia death statute; while the widow is a dependent under the Compensation Act and a next of kin within the meaning of the death statute of the District of Columbia.

On page 540 of the said case the United States Supreme Court observed that the administrator was not the only person who may maintain the action and said further that where the employer is given anything to recover, it is the entire recovery provided by the wrongful death act. It is this part of the decision in the *Ætna* case (*supra*) that led both of the Courts below to the decision that they reached.

The effect of this part of the decision must be considered

in the light of the facts before the Court at that time. It is unreasonable to assume that the Supreme Court of the United States would predicate an opinion covering more than the points that were actually before the Court at the time of the decision. Our belief in this wise is strengthened by that portion of the Court's opinion on page 543 where the Court said,

> "Nor do we consider what would be the rights of the person entitled to compensation or the personal representative of the deceased."

And at this point the Court referred to the case of *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 54-55, cited hereinbefore. Is it not significant that the Court made reference to pages 54 and 55 of the New York case (*supra*)? A reading of the case on the pages referred to by the Court reveals that where there are dependents or next of kin, who do not assign their cause of action; the administrator is the proper party plaintiff to maintain the action.

Much wisdom is embraced in the opinion written by Mr. Justice Cardozo in the *Zirpola* v. *Casselman* case (*supra*). and the opinion of Mr. Justice Pound in the *U. S. Fidelity and Guaranty Co.* v. *Graham & Norton Co.* case (*supra*), to say the least of the most recent opinion of Mr. Justice Parker of the Fourth Federal Circuit in *Betts* v. *Southern Ry. Co.* (*supra*). Juristic thought has long since agreed that before a court should give such an interpretation to a statute that works a hardship upon a particular class or group; it ought to struggle with all of the intellect that it possesses and with all of the vigor of mind that it has against such an interpretation of such statute; and unless the court is forced to come to a contrary conclusion it ought to assume that it is impossible that the legislature could have so intended. The substance of the above expression was laid down in *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. D.,

878; and received the approval of the Supreme Court of the United States in *Sorrell* v. *United States*, 287 U. S. 435.

In view of the highly important part the case of the *Ætna Life Insurance Co.* v. *Moses* (*supra*), played in influencing the opinions of both of the lower Courts; it is believed that an additional expression from the Supreme Court of the United States with respect to the exact scope of the said *Ætna* case is almost imperative.

Conclusion.

Under a practical application of the Compensation Act and in the light of the cases cited, it is submitted that the administrator has the right to maintain the action under the facts disclosed in the instant case, a Writ of Certiorari should be granted, and this Court should review the decision of the United States Court of Appeals for the District of Columbia, and finally reverse it.

NATHAN A. DOBBINS,
JAMES C. WATERS, JR.,
OTHO D. BRANSON,
Counsel for Petitioner.

APPENDIX.

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT, U. S. C. A. TITLE 33, CHAPTER 18.

Section 909. *Compensation for Death:*

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $200.

(b) If there be a surviving wife * * * and no child of the deceased under the age of eighteen years, to such wife * * * 35 per centum of the average wages of the deceased, during widowhood, * * * with two years compensation in one sum upon remarriage;"

Section 914. *Payment of Compensation:*

(m) "The total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500."

Section 917. *Compensation a Lien Against Assets:*

"Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise." * * *

Section 932. *Security for Compensation:*

(a) "Every employer shall secure the payment of compensation under this chapter—

(1) "By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund * * *."

Section 933. *Compensation for Injuries Where Third Persons are Liable:*

(a) "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

(b) "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

(c) "The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election."

(d) "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

(e) "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against third person."

(g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

CODE OF LAW FOR THE DISTRICT OF COLUMBIA.

Chapter Forty-five,

Negligence Causing Death

Section 1301. *Liability*—

"Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, * * * to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, * * *; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided*, That in no case shall the recovery under this act exceed the sum of ten thousand dollars * * *."

Section 1302. *By Whom Suit to be Brought*—

"Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured."

Section 1303. *Distribution of Damages*—

"The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia."

New York Compensation Law.

Section 29, Chapter 67.

"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ such injured employee, or in case of death, his dependents, shall before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured person, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elects to proceed against such other, the state insurance fund, person, association, or corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided or estimated by this chapter for such case. In case of payment of an award in accordance with subdivision 9 and 10 of section 15, such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with a reasonable funeral expense and the expense of medical treatments, which shall be in addition to any cause of action by the legal representative of the deceased. Such a cause of action assigned to the State may be prosecuted or compromised by the commissioner.

A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be

made only with the written approval of the commissioner, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian as the board may determine in each case.

INDEX.

Subject Index.

Brief for petitioner:	Page
Statement	1
Opinions of the courts below	4
Questions of law presented	4
Specification of errors	6
Argument	6
Conclusion	27

Table of Cases Cited.

Ætna Life Ins. Co. v. Moses, 287 U. S. 530	1, 5, 6, 10
Betts v. Southern Ry. Co., 71 F. (2d) 787	16
Carpo v. City of Syracuse, 183 N. Y. 395	8
Charleston Corp. v. Sinclair, 264 U. S. 543	12
Frost v. Wenie, 157 U. S. 45	12
Hunt v. Bank, 35 F. (2d) 136	24
Meekin v. Brooklyn H. R. R. Co., 164 N. Y. 145	7
Moore v. Christensen S. S. Co., 53 F. (2d) 299	24
Molz v. Hansell, 175 Atl. 880	11
Neubeck v. Lynch, 37 App. D. C. 576	5, 20, 21
Plumstead Board of Works v. Spackman, L. R. 13, Q. B. D. 878	26
Sorrell v. United States, 287 U. S. 435	26
Travelers Ins. Co. v. Padula, 224 N. Y. 397	12, 22
United States v. Burrough, 289 U. S. 164	12
U. S. Fidelity & Guaranty Co. v. Graham & Norton Co., 254 N. Y. 50	14, 16, 23
Zirpola v. Casselman, 237 N. Y. 367	11

Appendix.

District of Columbia Workmen's Compensation Act:	
Sec. 909	28
914 (m)	28
932 (a)	28
933 (a), (b), (c), (d), (e), (f), (g),	6, 7, 8, 9, 10, 11, 15, 16, 20, 25, 26, 29
944 (c)	16, 24, 31
Code, D. C., Sec. 1301-1302-1303	31
Sec. 29, Chapter 67, New York Compensation Law	12, 32

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE.

BRIEF FOR PETITIONER.

I

Statement.

This case involves the construction and interpretation of Section 933 (a), (b), (d), (e), (f), and (g) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424), as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), and the application of the decision of the Supreme Court of the United States in the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530.

The case arises upon an appeal from an order of the Supreme Court of the District of Columbia overruling t

demurrer of the petitioner herein to the respondent's plea in abatement and a judgment entered in favor of the respondent upon the petitioner's election to stand upon his demurrer. The parties will be hereinafter designated as plaintiff and defendant.

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, and his father, Charles M. Doleman, as his dependents and next of kin under the Compensation Act and the death statute.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, both as administrator and dependent of the said deceased employee, filed an election under the Compensation Act to proceed against the third party (Harry Levine), for the wrongful death of Robert R. Doleman.

On November 1, 1933, Charles M. Doleman, as the Administrator of the Estate of Robert R. Doleman, filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant acting by and through an

agent, servant, and employee negligently caused the death of Robert R. Doleman, and sought damages in the amount of Ten Thousand ($10,000) Dollars therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer"), filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant, and employee, negligently caused the death of Robert R. Doleman, and sought damages in the sum of Ten Thousand Dollars ($10,000) therefor.

The defendant, Harry Levine, filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The plaintiff and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the court. The court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the plaintiff's action. The opinion of the Supreme Court of the District of Columbia was published in 62 W. L. R. 77.

An appeal was taken to the United States Court of Appeals for the District of Columbia; the appeal was argued in said court on October 4, 1934; and on the 5th day of November, 1934, the United States Court of Appeals en-

tered judgment affirming the aforesaid judgment of the Supreme Court of the District of Columbia; and rendered an opinion wherein it was held that the action is maintainable only by the employer in accordance with the provisions of Paragraph (b) of Section 933 of the District of Columbia Workmen's Compensation Act (U. S. C. A. Title 33, Chapter 18) (R. p. 12).

II.

Opinions of the Courts Below.

The memorandum opinion filed in the Supreme Court of the District of Columbia is reported in 62 W. L. R. 77.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on the 5th day of November, 1934 (R. p. 12), and is reported in 62 W. L. R. 940.

III.

Questions of Law Presented.

(1) What is the proper construction of Section 933 (a) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424) as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), where one dependent elects both as administrator and dependent to sue third party wrongdoer while the other dependent elects to receive compensation?

(2) Who is the proper party to make the election referred to in Section 933 (a) of the said Longshoremen's and Harbor Workers' Compensation Act?

(3) Has the said Compensation Act repealed the death statute of the District of Columbia, where third party

wrongdoer is liable for the death of a deceased employee, so far as the rights of the next of kin of the deceased are concerned?

(4) What are the rights, first, of the person entitled to compensation who elects to sue third party wrongdoer; and, secondly, of the person entitled to compensation who elects to receive said compensation?

(5) Where the employer is given the right to maintain the action against third party wrongdoer, what is the proper distribution of the excess after reimbursement mentioned in Section 933 (e), (2) of said Act? Is this excess distributable among the next of kin or the dependents of the deceased employee?

(6) What is the proper application of the decision in the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530?

(7) What are the rights of the personal representative of the deceased?

(8) If the employee maintains the action against the third party wrongdoer, must the declaration set out the next of kin of the deceased as required under the decision of *Neubeck* v. *Lynch*, 37 App. D. C. 576, or must it be confined to dependents under the Compensation Act who may not be next of kin under the death statute?

(9) Can the rights vested in dependents who elect not to receive compensation under Section 933 (a) of the said Longshoremen's and Harbor Workers' Compensation Act be nullified by those dependents who elect to receive compensation under the said Act?

IV.

Specification of Errors.

1. The court erred in affirming the judgment of the Supreme Court of the District of Columbia (62 W. L. R. 77).

2. The court erred in holding that where there are two dependents under the District of Columbia Workmen's Compensation Act, one of whom accepts compensation and the other elects to proceed against the third party wrongdoer to recover damages for wrongful death of deceased employee, the acceptance of compensation by the one transfers the entire cause of action against the said third party wrong-doer to the employer; under Section 933 (b) of said Act (R. p. 16).

3. The court erred in holding that where one beneficiary elects to receive compensation and another not to, the employer's right to reimbursement is lost, should the administrator maintain the action (R. p. 16).

4. The court erred in its application of the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530.

5. The court erred in its construction of Section 933 (a), (b), (d), (e), (f), and (g) of the District of Columbia Workmen's Compensation Act. (45 Stat. 600.)

V.

ARGUMENT.

(A) The use of the term "person entitled to compensation" in Section 933 (a) of the Compensation Act has given rise to much confusion, where third party wrongdoer is responsible for the wrongful death of a deceased employee.

The facts in the instant case show that the plaintiff is the administrator of the estate of the deceased employee; and

a person entitled to compensation under the Compensation Act; as well as a next of kin within the meaning of the death by wrongful act statute of the District of Columbia.

On the other hand, the widow of the deceased employee is a person entitled to compensation under the Compensation Act and a next of kin within the meaning of the death by wrongful act statute of the District of Columbia.

The plaintiff elected to recover damages against the defendant, and this election was made in his capacity as the administrator, and also in the capacity of a person entitled to compensation. The widow accepted compensation. The question immediately arises with respect to who has the right of election to recover damages against the third party wrong-doer (defendant) or to accept compensation?

It must be conceded as fundamental that no cause of action existed at common law for the wrongful death of a human being. Such rights are creatures of statutory enactment. The wrongful death statute of the District of Columbia (Appendix pp. 31-32) gives to the next of kin of the deceased the right to receive all damages recoverable for the wrongful death of the deceased, but states that the action can be brought only by the personal representative of the deceased. The right to receive benefits from any amount recovered for the wrongful death of the deceased is a property right of all the dependents who are also all the next of kin. See

Re: Meekin v. *Brooklyn H. R. R. Co.*, 164 N. Y. 145.

What then is the logical purport of the language used in Section 933 (a) of the said Compensation Act? What did the Congress of the United States mean when it said that the "person entitled to compensation" may elect to sue third party wrong-doer or to accept compensation under the

Act? Whom did it intend to clothe with the power of election where there was one dependent who desired to pursue his right under the death by wrongful act statute while the other dependent wished to accept compensation under the act?

It must be assumed that Congress knew that the only rights that the dependents under the Compensation Act could assign to the employer were such rights as such dependents possessed as next of kin pursuant to the wrongful death statute of the District of Columbia.

Congress knew that the personal representative of the deceased was the only legal person competent to enforce any rights derivative of the wrongful death statute of the District of Columbia. Hence, the conclusion is inescapable that where there is one dependent who desires to assert his right against a third party wrong-doer and the other dependent wishes to accept compensation, the only logical person to make the election is the administrator. See:

Carpo v. *City of Syracuse*, 183 N. Y. 395.

It is true that the said Compensation Act is ambiguous; yet, there is sufficient clarity embraced therein to support the petitioner's right to make the said election. Section 933 (a) provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

Here we have under this section of the said Act two separate and distinct classes of injuries. The first, "if on account of a disability," and the second, "or death." Bear-

ing in mind these two distinct classes of injuries let us see; do we find their sequences in Section 933 (f) and (g) of said Act? The provisions of the said paragraphs are as follows:

> (f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person."
>
> (g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

In Section 933 (f) we also have two distinct parties; first, "the person entitled to compensation" and, second, "the representative." In Section 933 (g) we again have two distinct parties; first, "the person entitled to compensation," and, second, "the representative."

What does this suggest? Does it not say in so many words that in case of disability the injured employee has the right of election and in case of death the personal representative of the deceased employee has the right of election? Is it not apparent that the compromise referred to in 933 (g) means that where the employee is injured he is given the right to compromise; but where the injury results in the death of the employee the personal representative is given the right to compromise the action?

Here it must be conceded that the Congress of the United States intended that the personal representative of the deceased employee (administrator) should have the right of election where all of the persons entitled to compensation do not agree to accept compensation. In fairness and justice to all parties concerned, the administrator is the logical person to make the election under the circumstances:

(B) **What are the rights of the next of kin of the deceased employee who are not also dependents?**

It was conceded by counsel for the respective parties in the *Ætna Life Case*, 287 U. S. 530, and strenuously contended here by counsel for the defendant that Section 933 (a) of the said Compensation Act of the District of Columbia (Appendix p. 29) has repealed the death by wrongful act statute of the District of Columbia (Appendix p. 31). Counsel for plaintiff cannot concur in this view. The Supreme Court of the United States has laid down some well defined rules with respect to the repealing of antecedent statutes by implication. It must be agreed that there is no direct expression in Section 933 or any other section of the District of Columbia Compensation Act that repeals the death by wrongful act statute of the District of Columbia where third party wrongdoer is liable for the death of a deceased employee. Counsel for defendant admit that the District of Columbia Workmen's Compensation Act is drafted after the New York Compensation Law (See p. 5 of defendant's brief in opposition to writ of certiorari). Does this admission not strengthen the plaintiff's position with respect to the preservation of the rights of the next of kin under the death by wrongful act statute? Under the New York Compensation Act (See appendix pp. 32-33) the entire cause of action is transferred to the carrier etc. where the dependents accept compensation; yet, the Court of Appeals of New York has held continuously that

the rights of the next of kin are not impaired by the acceptance of compensation by the dependents unless all of the dependents are also all of the next of kin; and all accept compensation. See

Zirpola v. *Casselman*, 237 N. Y. 367.

Section 933 (a) of the District of Columbia Compensation Act does not transfer the entire cause of action to the employer upon the acceptance of compensation, but instead "the right of the person entitled to compensation" (See appendix p. 29). It is very probable that a person entitled to compensation may not be a next of kin and vice versa. It is to be presumed that Congress was aware of this probability at the time of the passage of the Compensation Act; that it knew that a dependent who was not a next of kin of the deceased employee possessed no assignable rights under the death by wrongful act statute of the District of Columbia.

Knowing as the Congress must have known, that dependents who were not next of kin had no rights against third party wrongdoer, it failed in the Compensation Act to create a right against third party wrongdoer, and in view of such omission it is strenuously urged that it was not the legislative intent to divest the next of kin of their rights under the death by wrongful act statute where third party wrongdoer is liable for the death of a deceased employee.

In the case of *Molz* v. *Hansell et al.*, 175 Atl. 880 (Decided December 18, 1934), the Superior Court of Pennsylvania held that a dependent under the Compensation Law who is not a next of kin under the death by wrongful act statute has no rights which are assignable to the employer upon the acceptance of compensation.

The instant case involves the construction of two congressional statutes; and the Supreme Court of the United States has said that the repealing of an antecedent statute by a

subsequent one, by implication, is not favored. In the case of *Frost vs. Wenie*, 15 Sup. Ct. 532, 157 U. S. 45, the Supreme Court said,

> "That where two statutes cover in whole or in part the same matter and are not irreconcilable, no purpose to repeal being clearly expressed or indicated, it is the duty of the court, if possible, to give effect to both."

See also:

Charleston Corporation v. *Sinclair*, 264 U. S. 543.
United States v. *Burrough*, 289 U. S. 164.

In view of the above mentioned, it is fair to conclude that the said Compensation Act has left unimpaired the rights of next of kin under the death by wrongful act statute where third party wrongdoer is liable for the death of a deceased employee.

(C) What are the rights of dependents under the Compensation Act who give notice of their intentions to recover damages against third party wrongdoer?

The question here presented is identical to the question presented to the New York Court of Appeals at the time of the decision in the case of *Zirpola* v. *Casselman* (*supra*). The conditions confronting dependents who were also next of kin under the New York Compensation Act (See appendix pp. 32-33) and who elected to recover damages against third party wrongdoer were analogous to the present conditions of similar dependents under the District of Columbia Compensation Act (See appendix p. 28).

The decision in the case of *Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y. 397, in construing Section 29 of Chapter 67 of the New York Compensation Act had given rise to the impression that the employer was given the right to maintain the action against third party wrongdoer where

any of the dependents accepted compensation; but the Court of Appeals of New York in the case of *Zirpola* v. *Casselman* (*supra*), speaking through Mr. Justice Cardozo in a most exhaustive opinion said:

> P. 372: "We think that the cause of action against third parties for the benefit of next of kin is unchanged by the Compensation Act except to the extent that the Act substitutes the carrier, upon the execution of appropriate assignments, to the distributive shares of next of kin who claim as dependents also. The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the dependents should be applied in reduction of the burdens that were placed upon the carrier."

The learned and far reaching opinion goes on to state that:

> P. 372: "The Compensation Act regulates the relation, not between a workman and the world, but between the workman and the employer. In doing this it charges the employer with liabilities of a different order. It leaves untouched, on the other hand, the duties and liabilities of wrongdoer outside of the relation which it regulates, and contents itself with guarding against a duplication of benefits by appropriate provision for subrogation or allowance. A dependent who is also within the class of next of kin may get his distributive share under the old act and thereafter under the new one, but what he gets upon the first must be credited upon the second."

In concluding the court laid down four fundamental principles which may well serve as a monumental guide in the construction of death by wrongful act statutes in con-

nection with compensation acts where third parties are liable for death of deceased employees.

P. 375: (1) "If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier who may sue or compromise at will."

(2) "If dependents electing to assign are members of the class of next of kin, but not all members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary must prosecute through the administrator as the statutory trustee, and may compromise or release it."

(3) "If dependents who are next of kin elect not to assign, but retain their cause of action, they retain it with all of the incidents prescribed by the laws of its creation."

(4) "These dependents who are not next of kin and who are, therefore, without beneficial interest in the cause of action against the wrongdoer, are not put to an election since they have nothing to elect."

The above decision lays down a liberal and equitable rule; a rule that guarantees the next of kin as well as dependents who elect not to assign their cause of action, the equal protection of the law. The question arose in New York again in the case of *U. S. Fidelity & Guaranty Co.* vs. *Graham & Norton Co.*, 254 N. Y. 50, where the court spoke as follows:

"Edward Streeter died as a result of an accident arising out of and during the course of his employment alleged to be due to the negligence of another not in the same employ. He left a widow and six children. Five of the children were included in the group of dependents under the age of 18, who, with the widow, came under the protection of the Workmen's Com-

pensation Act (Consol. Law C. 67). The sixth child, although belonging to the group of next of kin, did not come within the group of dependents protected by the Workmen's Compensation Law. The widow and five children, as was their right, elected to accept compensation rather than to pursue the statutory remedy through the appointment of an administrator against the alleged wrongdoer. They received an award which has been paid. The result was an assignment to the insurance carrier of their beneficial interest of the widow and dependent children, only in such a recovery as an administrator might have secured had one been appointed and instituted suit."

Held: "The authority of the *Zirpola* case is not impaired by the later decision in the *Staten Island* case (251 N. Y. 127, 167 N. E. 194). The action should have been brought through an administrator as the statutory trustee of the entire group of beneficiaries. If dependents electing to assign are members of the class of next of kin, but not all of the members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary, must prosecute through the administrator as the statutory trustee, and may compromise or release its own interest, but no other."

Not only do the New York cases give the right of action to the administrator where some of the dependents elect to sue third party wrongdoer, but Section 933 (a) of the Longshoremen's and Harbor Workers' Compensation Act expressly reserves this right to dependents who desire to elect to sue third party wrongdoer. The said section provides as follows:

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner

> in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

In the case of *Betts* v. *Southern Ry. Co.*, 71 F. (2d) 787, decided on June 11, 1934, by Justice Parker of the Fourth Circuit, it was held that where the administrator had sued for the wrongful death of an employee by a third party wrongdoer and the widow accepts compensation subsequently, that such acceptance of compensation does not give the employer the right to be substituted as party plaintiff against the third party wrongdoer.

From the above decision it may be seen that the modern trend is for the adoption of the rule laid down by the New York Court of Appeals (237 N. Y. 367, 254 N. Y. 50) hereinbefore discussed in this brief.

It is fundamental that words employed in a statute must be given their plain and ordinary meaning. Section 933 (a) of the Act only transfers to the employer the right of dependents accepting compensation. This section does not transfer the entire cause of action to the employer because if Congress had intended such transfer it would have used the term "all of the rights of the personal representative of the deceased" instead of employing the term "all of the rights of the person entitled to compensation."

This contention is borne out by the usage of the term in Section 933 (c) where we find the following:

> "The payment of such compensation into the fund established in Section 944 of this chapter shall operate as an assignment of all of the rights of the personal representative of the deceased."

It is clear from the very language of the act that Congress intended to reserve to those dependents who elected to sue third party wrongdoer their cause of action. It is incon-

ceivable to think that Congress would guarantee dependents a cause of action and then deny them the right to assert that cause of action. The rule laid down by the New York Court of Appeals giving the administrator the right to maintain the action where all of the dependents do not elect to receive compensation secures to every class of beneficiaries both under the death statute and compensation law the just and equal shares that the law created for them.

(D) **The decision of the United States Court of Appeals for the District of Columbia imposes a burden upon dependents, electing not to assign their cause of action to the employer.**

It is noted that in the opinion of the United States Court of Appeals for the District of Columbia (R. 16), the following proposition of law is laid down:

> "If, therefore, it should be held that, in a case of death, where one beneficiary elects to receive compensation and another not to, the employer's exclusive right to bring the action is lost, the result would be either that the employer's right to reimbursement would be denied or the third party would be subjected to two separate and independent *suits for the same cause* of action."

A casual reading of Section 373 *et seq.* of the statute of distribution of the District of Columbia and the Compensation Act will unearth the fallacy reached in the above conclusion by the court. Upon what proposition of law or reason does the court below predicate its conclusion with respect to the employer's denial of reimbursement? It must be conceded without argument, that should all of the persons entitled to compensation elect to sue third party wrongdoer, the employer is not only denied the right of reimbursement, but is also liable to the persons en-

titled to compensation for any deficiency that exists between the amount of the judgment obtained and the amount the persons entitled to compensation are entitled to receive under the Compensation Act. Now let us assume for the purpose of the argument, that in the case at issue the administrator is given the right to maintain the action against the defendant. How would this affect the right of the employer to reimbursement? Certainly it cannot be argued that Congress intended the employer to be reimbursed as against those dependents who do not assign their cause of action to the employer. Is it not logical and reasonable to conclude that the employer is entitled only to the proportionate share of the dependent who elected to receive compensation? What, then, is the right of such employer and how is he to receive his reimbursement? The plaintiff, as administrator, would be required under the statute of the District of Columbia to make distribution in the following manner: The cost of administration, including a reasonable attorney's fee; then distribute the balance, one half to the employer per his assignment and one half to himself, since he is also the only next of kin of the deceased; see Sections 376 and 380 of the District of Columbia Code.

However, the argument does not stop here. Let us then consider the converse of the proposition enunciated above. What would be the amount receivable by the plaintiff, should the employer in the instant case be given the right to maintain the action and he recovers a judgment against the defendant in the amount of seven thousand five hundred (7,500) dollars? Out of this amount the plaintiff, a next of kin and dependent, who elected not to assign his cause of action, would receive approximately four hundred ninety-two (492) dollars, while the employer would receive approximately seven thousand eight (7,008) dollars. Should the administrator be given the right to maintain the action and

a similar judgment is obtained against the dependent, the employer would receive one half minus cost and a reasonable attorney's fee or approximately two thousand seven hundred (2,700) dollars each.

What then is the reason for the unequal distribution of the proceeds from a judgment recovered against third party wrongdoers where the employer maintains the action? The answer lies in Section 933 (e), (1), (A), (B), and (C) of the District of Columbia Compensation Act, which reads as follows:

> (e) "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to:
>
> (A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).
>
> (B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.
>
> (C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and——

It is because of the hardship which the reimbursements, mentioned in the above section would work upon those dependents who elected not to assign their cause of action, that we insist Congress could not have intended to give the right of action to the employer in the instant case.

(E) Should the employer maintain the action against third party in the instant case, what should be the proper distribution of the excess after reimbursement?

Section 933 (2) of the said Compensation Act provides:

"The employer shall pay any excess to the person entitled to compensation or to the representative."

It is to be observed that this section does not provide whether the person entitled to compensation or the representative shall distribute the excess received by him to the next of kin, or dependents who elected not to assign or whether such excess is to be retained by him. Naturally the question arises with respect to what is the proper distribution of the excess referred to in Section 933 (2) of the said Act.

If the person entitled to compensation is to make the distribution according to the statute of distribution in the District of Columbia, he cannot make said distribution as such, but must qualify as administrator before said distribution can be made. If the personal representative is to make the distribution, to whom should he make such distribution? Under the statute of the District of Columbia he is limited in making distribution to the next of kin of the deceased.

In considering the right of the employer to maintain the action against third party, we cannot overlook the question as to how should the declaration be drawn. The decision of the United States Court of Appeals for the District of Columbia in *Neubeck* v. *Lynch*, 37 App. D. C. 576, holds that in an action for wrongful death the next of kin of the deceased must be named in the declaration. Should the dependents who assign their cause of action to the employer be not also next of kin of the deceased, grave doubt must arise as to how the action could be maintained by the em-

ployer since the said Compensation Act fails to provide the mode of procedure where the employer sues the third party wrongdoer.

(F) The United States Court of Appeals erred in its application of the Ætna Life case, 287 U. S. 530.

It is indeed a most difficult task confronting counsel for the plaintiff in endeavoring to place a construction upon a decision of the Supreme Court of the United States in argument before the highest tribunal of the land. However, it is our position that the United States Court of Appeals for the District of Columbia erred in its application of the *Ætna Life* case (*supra*); we therefore, proceed to defend this position.

What were the circumstances and conditions surrounding the *Ætna Life* case (*supra*) at the time of the decision therein? Is it not true that there was no objection made on behalf of the administratrix as to who should maintain the action? Is it not true that the real question urged by counsel for the plaintiff was that with respect to the right of the insurance company to maintain the action because of a contractual right of subrogation instead of the employer?

The facts in the *Ætna Life* case (*supra*) differ materially from the facts in the case at issue. In the said *Ætna Life* case the widow was the administratrix of the estate of the deceased and also the only person entitled to compensation under the Compensation Act. Under such circumstances the widow was the most competent person in all the land to make the election to accept compensation, and by so doing transferred the entire cause of action to the employer. What reason underlies this principle? It is because the widow as administratrix was clothed with the authority to bind the next of kin under the death by wrongful act statute, and also as the only dependent under the Compensation Act. She was the sole beneficiary under both

statutes and in a position to assign the entire cause of action to the employer. In the case of *Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y. 397, where there was a widow and two minor children constituting all of the next of kin and dependents of the deceased, the widow accepting compensation for herself and two minor children, the court held that the action was maintainable by the carrier without the appointment of an administratrix. In the *Zirpola* case hereinbefore discussed the court in its first principle said,

> "If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier who may sue or compromise at will."

We cannot close our eyes to the fact that the above mentioned cases were accessible to the court at the time of the decision in the *Ætna Life* case (*supra*). It is interesting to note from the very outset the expression of Mr. Justice Stone speaking in the *Ætna Life* case (*supra*), where on pages 538 and 539 he said,

> "The election to accept compensation was made by the widow *as she is both the administratrix and the only person entitled to compensation,* the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances."

The very language used by the learned Justice from the very outset clearly shows that the *Ætna Life* case (*supra*) must be limited to the facts contained in that case. The facts in the present case, however, show that the plaintiff is the administrator of the estate of the deceased; that he is a dependent under the Compensation Act who elected to sue third party wrongdoer; and that he is a next of kin within the meaning of the District of Columbia death statute; while the widow is a dependent under the Compen-

sation Act and a next of kin within the meaning of the death statute of the District of Columbia.

It is reasonable to infer that the decision in the said *Ætna Life* case rests on the first principle laid down in the *Zirpola* case (*supra*). It is equally reasonable to contend that the second principle laid down in the *Zirpola* case (*supra*) is applicable to the case at issue and ought to be adopted by the Supreme Court of the United States in determining the question here presented.

On page 540 of the said case the United States Supreme Court observed that the administrator was not the only person who may maintain the action, and said further that where the employer is given anything to recover, it is the entire recovery provided by the wrongful death act. It is this part of the decision in the *Ætna* case (*supra*) that led both of the courts below to the decision that they reached.

The effect of this part of the decision must be considered in the light of the facts before the court at that time. It is unreasonable to assume that the Supreme Court of the United States would predicate an opinion covering more than the points that were actually before the court at the time of the decision. Our belief in this wise is strengthened by that portion of the court's opinion on page 543 where the court said,

> "Nor do we consider what would be the rights of the person entitled to compensation or the personal representative of the deceased."

And at this point the court referred to the case of *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 54-55, cited hereinbefore. Is it not significant that the court made reference to pages 54 and 55 of the *New York* case (*supra*)? A reading of the case on the pages referred to by the court reveals that where there are dependents or next of kin, who do not assign their cause of

action, the administrator is the proper party plaintiff to maintain the action.

Much wisdom is embraced in the opinion written by Mr. Justice Cardozo in the *Zirpola* v. *Casselman* case (*supra*) and the opinion of Mr. Justice Pound in the *U. S. Fidelity and Guaranty Co.* v. *Graham & Norton Co.* case (*supra*), to say the least of the most recent opinion of Mr. Justice Parker of the Fourth Federal Circuit in *Betts* v. *Southern Ry. Co.* (*supra*).

It may be observed that two cases decided by the United States Circuit Court of Appeals for the Fourth and Fifth Circuits and cited by counsel for defendant on page five (5) of their brief in opposition to petition for a writ of certiorari, clearly demonstrate the attitude of employers who are given the right to maintain the action where third party is liable for injury or death. In one of the said cases, *Hunt* v. *Bank*, 35 F. (2d) 136, the court held that where the employee had accepted compensation and the employer refused to sue third party wrongdoer, there was no remedy open to the said employee to recover the excess after reimbursement afforded him under the Compensation Act.

In the other case, *Moore* v. *Christensen S. S. Co.*, 53 F. (2d) 299, the court held that even though the administrator brought the action against the third party wrongdoer, and at the time it was brought, the employer had not paid the one thousand ($1,000) dollars into the sinking fund pursuant to Section 944 of the Longshoremen's and Harbor Worker's Compensation Act (see appendix p. 30), the subsequent paying of the said one thousand ($1,000) dollars into the said fund by the employer was sufficient ground for the dismissal of the suit brought by the administrator, and the administrator could not complain because of the failure of the employer to sue third party wrongdoers for wrongful death of deceased employee.

The *Moore* case (*supra*) was decided under Section 933 (c) of the said Longshoremen's Act, and it was an instance where there was no person entitled to compensation, but where the deceased employee left next of kin.

While the questions presented in these two cases are not before the court on this appeal yet they may serve as a guide in limiting the right of the employer to the strict letter of the statute. There can be no question that where the employer controls the interest of the third party wrongdoer, upon appropriate assignment he will almost never institute proceedings against such third party wrongdoer and the result is that the administrator or the employee is denied the right to receive the excess after reimbursement guaranteed under the Compensation Act.

The opinion of the United States Court of Appeals for the District of Columbia (R., p. 17) quotes from page 540 of the opinion of the Supreme Court of the United States in the *Ætna Life* case (*supra*) as follows:

> "'Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act.'"

The said United States Court of Appeals for the District of Columbia stated further in its opinion:

> "In the facts here, the employer, having paid compensation to the widow, under the provisions of the act is entitled to recover the amount paid. We think this is perfectly clear and, if it be granted, it follows inevitably that in the light of the above quoted language of the Supreme Court the right to recover part is the right to recover all."

We fail to find the analogy between the above language used by the Supreme Court and that employed by the said United States Court of Appeals for the District of Columbia. The question then is when is the employer given

anything to recover? It is submitted that under the said Compensation Act the only instances in which the employer is given anything to recover, where third party is liable for the death of deceased employee are:

(1) Where all of the next of kin are all of the persons entitled to compensation and all accept compensation, and

(2) Under Section 933 (c) of the said Compensation Act. (See appendix p. 29.)

Juristic thought has long since agreed that before a court should give such an interpretation to a statute that works a hardship upon a particular class or group, it ought to struggle with all of the intellect that it possesses and with all of the vigor of mind that it has against such an interpretation of such statute; and, unless the court is forced to come to a contrary conclusion it ought to assume that it is impossible that the Legislature could have so intended. The substance of the above expression was laid down in *Plumstead Board of Works* v. *Spackman*, L. R. 13, Q. B. D. 878; and received the approval of the Supreme Court of the United States in *Sorrell* v. *United States*, 287 U. S. 435.

In view of the rights of the next of kin under the death by wrongful act statute of the District of Columbia and the rights of the dependents under the District of Columbia Compensation Act who elect to recover damages against third party wrongdoer for the death of deceased employees, it is sincerely urged that this Court reverse the said decision of the United States Court of Appeals for the District of Columbia.

Conclusion.

Under a practical application of the Compensation Act and in the light of the cases cited, it is submitted that the administrator has the right to maintain the action under the facts disclosed in the instant case, and that by virtue of same the Supreme Court of the United States should reverse the judgment of the court below.

NATHAN A. DOBBINS,
JAMES C. WATERS, JR.,
OTHO D. BRANSON,
Counsel for Petitioner.

APPENDIX.

District of Columbia Workmen's Compensation Act, U. S. C. A. Title 33, Chapter 18.

Section 909. *Compensation for Death:*

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $200.

(b) If there be a surviving wife—and no child of the deceased under the age of eighteen years, to such wife—35 per centum of the average wages of the deceased, during widowhood * * * with two years compensation in one sum upon remarriage;" * * *

Section 914. *Payment of Compensation* * * *:

(m) "The total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500."

Section 917. *Compensation a Lien Against Assets:*

"Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise." * * *

Section 932. *Security for Compensation:*

(a) "Every employer shall secure the payment of compensation under this chapter—

(1) "By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund * * *."

Section 933. *Compensation for Injuries Where Third Persons Are Liable:*

(a) "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

(b) "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

(c) "The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election."

(d) "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

(e) "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:

(1) The employer shall retain an amount equal to——

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reason-

able attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against third person."

(g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

Section 944. *Special fund.*—

(c) "Payments into such fund shall be made as follows:

(1) "Each employer shall pay $1,000 as compensation for the death of an employee of such employer

resulting from injury where the deputy commissioner determines that there is no person entitled under this chapter to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 908 of this chapter, and 50 per centum shall be available for payments under subdivision (g) of said section."

Code of Law for the District of Columbia.

Chapter Forty-five.

Negligence Causing Death.

Section 1301. *Liability.*—

"Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured—to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured—and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided,* That in no case shall the recovery under this act exceed the sum of ten thousand dollars • • •"

Section 1302. *By Whom Suit To Be Brought.*—

"Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured."

Section 1303. *Distribution of Damages.*—

"The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities

of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia."

New York Compensation Law.

Section 29, Chapter 67:

"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ such injured employee, or in case of death, his dependents, shall before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured person, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elects to proceed against such other, the state insurance fund, person, association, or corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided or estimated by this chapter for such case. In case of payment of an award in accordance with subdivision 9 and 10 of section 15, such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with a reasonable funeral expense and the expense of medical treatments, which shall be in addition to any cause of action by the legal representative of the deceased. Such a cause of action as-

signed to the State may be prosecuted or compromised by the commissioner.

"A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commissioner, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian as the board may determine in each case."

(6110-C)

FILE COPY

Office Supreme Court,
FILED
FEB 16 19
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 574.

CHARLES M. DOLEMAN, Administrator of the Estate of Robert R. Doleman,
Petitioner,

vs.

HARRY LEVINE,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

EDWARD S. BRASHEARS,
WILSON L. TOWNSEND,
ALBERT F. BEASLEY,
Attorneys for Respondent,
Investment Bldg.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Matter.

	Page
STATEMENT	1
ARGUMENT	2
There Is Only One Right Of Action For Negligence Causing Death In The District Of Columbia	3
The Right Of Action Under The Death By Wrongful Act Statute Has Been Assigned To The Employer	7
CONCLUSION	12

Table of Cases.

Aetna Life Insurance Co. vs. Moses, 287 U. S. 530, 77 L. Ed. 477	4, 7
Arizona Employers' Liability Cases, 250 U. S. 400, 63 L. Ed. 1058	10
Backus vs. Fort St. Union Depot Co., 169 U. S. 559, 42 L. Ed. 853	10
Baltimore Steamship Co. vs. Phillips, 274 U. S. 316, 71 L. Ed. 1069	6
Brannenburg vs. Indianapolis P. & C. R. Co., 13 Ind. 103, 74 Am. Dec. 250	6
Hunt vs. Bank Line, 35 Fed. (2nd) 136	4, 5
Kansas City M. & O. R. Co. vs. Shutt, 24 Okla. 96, 104 Pac. 51, 20 Ann. Cas. 255	7
Louisville & N. R. Co. vs. Mottley, 219 U. S. 467, 55 L. Ed. 297	10
Middleton vs. Texas Power etc. Co., 249 U. S. 152, 63 L. Ed. 527	10
Mondon vs. New York etc. Co., 223 U. S. 1, 56 L. Ed. 327	10
Moore vs. Christensen S. S. Co., 53 Fed. (2nd) 299	4, 5, 8
Storrs vs. Mech (Md. 1934), 170 Atl. 743	4, 5
United States Fidelity & Guaranty Co. vs. Graham & Norton Co., 254 N. Y. 50, 171 N. E. 903	4
Wheeler Sav. Bank vs. Tracey, 141 Mo. 252, 42 S. W. 946, 64 A. S. R. 505	6
Zirpola vs. Casselman, 237 N. Y. 367, 143 N. E. 222	4, 5
1 R. C. L. 344	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 574.

CHARLES M. DOLEMAN, Administrator of the Estate of Robert R. Doleman,
Petitioner,

vs.

HARRY LEVINE,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review the judgment affirming the action of the Supreme Court of the District of Columbia in overruling the demurrer to a plea in abatement and dismissing the suit.

The case involves the construction of the Longshoremen's and Harbor Workers Compensation Act, approved March 4, 1927 (U. S. C., Title 33, Chapter 18), as made applicable to employment in the District of Columbia by Act

of Congress approved May 17, 1928 (D. C. Code, Title 19, Chapter 2), which will hereinafter be referred to as the "Compensation Act"; and the Act of Congress of February 17, 1885 (23 Stat. at L. 307, Chapter 126; D. C. Code 1924, Sections 1301-1303; D. C. Code 1930, Title 21), which is a statute providing for liability for negligence causing death, and which will hereinafter be referred to as the "Death by Wrongful Act Statute".

The facts of this case have been fairly and accurately set forth in the petition for a writ of certiorari, and need not be repeated here.

For the sake of convenience, the petitioner will hereinafter be referred to as the plaintiff, and the respondent will hereinafter be referred to as the defendant. This is the position that was occupied by the parties hereto in the lower Court. The Potomac Electric Power Company, which, as appears from the record and the statement of facts, was the employer of the deceased and is paying and has paid compensation to Mary E. Doleman, widow of the deceased, and filed the other action against the defendant, will hereinafter be referred to as the "employer".

ARGUMENT.

At the outset of the argument the defendant desires to inform the Court that he has been named as defendant and served with process in two separate suits, each of which claims damages from him for the same alleged negligent act resulting in the death of Robert Doleman. Primarily, the defendant's position is that the right of action for negligence causing death is a single action, which cannot be split, and, before being put to his defense on the allegations of negligence, he is entitled to a decision finally determining which of the two suits that have been filed he must answer and defend. Having been served with process in both suits, and being required to appear and answer each case, and having no preference as between the two suits filed, the defendant filed a plea in abatement in

each suit, asserting in each plea that the other suit was properly brought and that the suit in which the plea was filed should abate.

The argument hereinafter will therefore be divided into two sub-divisions, in the first of which the defendant will support his primary position that he should be required to defend only one action, and in the second will support his plea in abatement in this case that the suit by the employer was the only proper and valid suit which could be maintained under the facts of this case.

There is Only One Right of Action for Negligence Causing Death in the District of Columbia.

The right to maintain an action and to recover damages for negligence causing death is solely statutory, and did not exist at common law. In the District of Columbia, such a right is expressly created by the Death by Wrongful Act Statute, which provides that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death".

The Compensation Act, similar in nature and purpose to the compensation laws in the various states, was designed to regulate the rights and liabilities between employer and employee. A burden is thereby placed upon an employer to secure compensation for an injury or death resulting from an accident without regard to fault or negligence on the employer's part. It is in effect a charge upon the industry or business in which the employer and the employees in any case are engaged; and upon that theory has been held to be constitutional. It is limited in its application to cases involving the relationship of employer and employee, or master and servant. See:

Crowell vs. Benson, 285 U. S. 22; 76 L. Ed. 598.

The Compensation Act makes provision for certain rights of the employer in cases where the injury to an employee

was caused by negligence of a third party, These provisions are found in Section 33 of the Act, and a casual reading of Section 33 discloses that such right or rights as are acquired by the employer are by way of assignment. The manifest purpose of this section is to give to the employer some right or opportunity of obtaining reimbursement in a case where he has been required to pay compensation, due to the fact that the injury occurred to the employee during the course of the employment, when the injury was occasioned by the negligence of a third party.

The Compensation Act did not create a new cause of action for negligence causing death.

> Aetna Life Insurance Company vs. Moses, 287 U. S. 530, 77 L. Ed. 477.
> Hunt vs. Bank Line, 35 Fed. (2nd) 136.
> Moore vs. Christensen S. S. Co., 53 Fed. (2nd) 299.
> Zirpola vs. Casselman, 237 N. Y. 367, 143 N. E. 222.
> U. S. Fidelity and Guaranty Company vs. Graham and Norton Company, 254 N. Y. 50, 171 N. E. 903.
> Storrs vs. Mech (Md. 1934), 170 Atl. 743.

In the case of Aetna Life Insurance Company vs. Moses, *supra*, this Court, in dealing with the Compensation Act and the Death by Wrongful Act Statute in question here, rejected the idea that the compensation law created any new cause of action for negligence causing death. In its opinion this Court said:

> "In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to recover damages from the third person. Double recovery by the employee * * * is thus avoided. * * *
>
> "In this case the injury resulted in the death of the employee and the election to take compensation was made by the widow. * * * Her election has called into operation the statutory assignment so far as it applies

to the action for wrongful death. We must decide its effect on that cause of action."

In the case of Hunt vs. Bank Line, *supra*, the Circuit Court of Appeals for the Fourth Circuit, in a case under the Longshoremen's Act, held that upon acceptance of compensation an employee could not thereafter sue the third party whose negligence caused the injury, even though the employer refused to bring such a suit, as the entire right of action passed to the employer.

In the case of Moore vs. Christensen S. S. Company, *supra*, the Circuit Court of Appeals for the Fifth Circuit, in affirming a decision of the District Court denying the right of the Administrator of a deceased longshoreman to sue the third party whose negligence allegedly caused the death, said:

> "It is not to be supposed that for the same injury or death two actions against the same party were contemplated, one under the state law and another under the Act of Congress".

In Zirpola vs. Casselman, *supra*, the New York Court, in construing the New York Workmen's Compensation Law, which incidentally was the model used in drafting the Longshoremen's Act, said:

> "The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the dependents should be applied in reduction of the burdens that were placed upon the carrier."

In the very recent case of Storrs vs. Mech, *supra*, the Court of Appeals of Maryland, in construing a case involving construction of the death statute and the pro-

visions of the workmen's compensation law relative to actions where an employee is killed, said:

> "In other words, section 58 of Article 101 does not create any new liability, but simply designates in what manner the liability theretobefore existing under the common law and Lord Campbell's Act, should be enforced, and changes the parties who might be benefited by such enforcement.
>
> . . . . . .
>
> "There is nothing in conflict between the provisions of Article 67, 'Lord Campbell's Act', and Article 101 'Workmen's Compensation'. They both unquestionably deal with recovery for injuries resulting in death. The two statutes are in *pari materia* and must be construed together."

The opinion of the United States Court of Appeals in this case held that the most casual reading of the Act necessarily excluded any assumption that the third party would be subjected to separate and independent suits for the same cause of action. Indeed, it is not urged that the Compensation Act creates any new and separate cause of action against an alleged third party wrongdoer; and counsel for the defendant have been unable to find any case in which any Court has held that such a law created any such new cause of action. All of the authorities that have been found either expressly hold, or assume, that there is but one cause of action for negligence causing death.

Generally, a single wrongful or negligent act can give rise to but one cause of action in tort.

1 R. C. L. 344.

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316; 71 L. Ed. 1069.

Brannenburg vs. Indianapolis P. & C. R. Co., 13 Ind. 103, 74 Am. Dec. 250.

Wheeler Sav. Bank vs. Tracey, 141 Mo. 252; 42 S. W. 946; 64 A. S. R. 505.

Kansas City M. & O. R. Co. vs. Shutt, 24 Okla. 96; 104 Pac. 51; 20 Ann. Cas. 255.

Since there is, and can be, only one cause of action for negligence causing death, the sole question presented in this case is the question of who is the proper party to maintain the action.

The Right of Action Under the Death by Wrongful Act Statute Has Been Assigned to the Employer.

There being one, and only one, right of action for negligence causing death, the question as to who is the proper party to maintain the action becomes one of statutory construction. The petitioner has set forth in the appendix to his brief Section 33 of the Compensation Act. The question of whether, under the facts of this case, the cause of action against the third party alleged wrongdoer has been assigned to the employer depends upon the construction of this Section 33.

It is perfectly clear from reading the provisions of Section 33 that when the employee is injured by reason of the alleged negligence of the third party, and the employee accepts compensation, the right of action is assigned to the employer. When the injury results in the death of the employee, the Statute is not so clear, and may well be said to be ambiguous, particularly by reason of the use of the words "of the person entitled to compensation". However, by reading together the various sub-paragraphs, it is apparent that the Act contemplates the same result in a case where death results as in a case of injury without death to the employee, namely, that when the employer is required under the Compensation Act to pay compensation the right of action against the third party alleged wrongdoer shall be assigned to him.

This Section 33 was involved in the case of Aetna Life Insurance Company vs. Moses, *supra*, and was construed

by this Court. In that opinion, and after discussing the various sub-paragraphs of Section 33, this Court said:

> "Having regard to these provisions and to the general purpose which the Act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former."

Further, in the opinion in the Moses case, this Court called attention to the fact that there would be no meaning to the language of Section 33 (2), directing the employer to pay any excess to the person entitled to compensation or to the representative, if it had been intended that the employer should get by way of assignment anything less than the entire right of action.

In the case of Moore vs. Christensen S. S. Company, *supra*, the Court further stated in its opinion that:

> "It clearly was the intent of Congress to assign to the employer all rights of the legal representative of the deceased, and also to enumerate the classes of the beneficiaries on whose behalf recovery might be had."

In this case we are concerned with a question of what person, or legal entity, is vested with the authority and right to maintain an action against the third party alleged wrongdoer for negligence causing death. In this connection the question may be said to be one of procedure. The defendant in this case is not concerned with questions of equities between next of kin or dependents, or with distribution of the proceeds of a recovery. Those questions may be settled and determined by the parties claiming an inter-

est therein, after the liability of the third party is determined. Obviously, the question of distribution of proceeds from recovery cannot arise unless the negligence question has been voluntarily settled or has been determined adversely to the third party and a judgment has been rendered against him.

The law, therefore, should be settled as to who is the proper person to institute and maintain such an action; or, otherwise, any third party, charged with negligence in connection with the death of an employee, would be unable to determine the person with whom he could, if he desired, settle or compromise the claim, nor would he know whose suit he might properly be called upon to defend.

The question of who is the proper person to maintain the action against the third party depends upon whether or not there was a valid election to accept compensation, which, under the terms of Section 33 of the Compensation Act, transferred the right of action to the employer.

In the light of the decision of this Court in the case of Aetna Life Insurance Company vs. Moses, *supra*, it is submitted that the decision of the United States Court of Appeals for the District of Columbia in this case, in which it was held that the employer, having paid compensation to the widow, is entitled to recover the amount paid, and that the right to recover part is the right to recover all, and further that where any beneficiary elects to take compensation the employer has the exclusive right to bring the action, is the correct and proper construction of the Compensation Act and is the correct and proper determination of the question as to who may maintain the action.

The plaintiff, in his brief, goes into great length to discuss certain inequities and discrimination in the distribution of the proceeds of a successful suit that would result from the decision that has been rendered in this case.

The right of action for negligence causing death is not an asset of the estate of the decedent, recovery under any such action is not subject to the debts of the decedent, and the

provisions of the Statute providing for distribution to next of kin are merely a convenient method for distribution of damages and do not create any vested interest in any estate.

It would seem that he complains that, by holding that the right of action is assigned to the employer, the method of distribution of the proceeds of the litigation is changed from that which is set out in the Death by Wrongful Act Statute, and that he is thereby being deprived of certain vested rights under the Death by Wrongful Act Statute. The Compensation Act was in force long before the happening of the accident which resulted in the death of the decedent; and the plaintiff had no vested interest to be deprived of.

It is submitted there are no vested rights in the method of distribution of damages received under a death statute. There are no vested rights in existing law which preclude its change or repeal. See:

Louisville & N. R. Co. vs. Mottley, 219 U. S. 467; 55 L. Ed. 297.
Mondon vs. New York, etc. Co., 223 U. S. 1; 56 L. Ed. 327.
Backus vs. Fort St. Union Depot Co., 169 U. S. 557; 42 L. Ed. 853.
Middleton vs. Texas Power, etc. Co., 249 U. S. 152; 63 L. Ed. 527.
Arizona Employers' Liability Cases, 250 U. S. 400; 63 L. Ed. 1058.

It would seem beyond argument that, since the right of action for negligence causing death is purely statutory, the Congress has the power to and may change the provisions of the Death by Wrongful Act Statute, and may set up a different method of distribution of the proceeds of such a suit, or may provide for a new class of beneficiaries. Dependents may properly be given a preference over next of kin. It may well be said that Congress has, by the enact- of the Compensation Act, changed the method of distribu-

tion under the Death by Wrongful Act Statute in any case in which the Compensation Act is also drawn into operation by proceedings thereunder. Such was the situation in the case of Storrs vs. Mech, *supra*, in which the Maryland Court of Appeals held that the Workmen's Compensation Law in Maryland had amended the Lord Campbell's Act whenever applicable by setting up a new class of beneficiaries.

The plaintiff concedes that under the facts of the Aetna case, *supra*, the right of action was validly assigned to the employer. Does not this destroy most of his arguments about the injustice of next of kin being barred, or their distributive share being diminished by reason of such assignment? In the Aetna case there might have been several next of kin, not dependents, who would have suffered all of the inequities and discrimination he sets forth, yet he concedes that there was a proper transfer; and it would therefore seem that the argument advanced cannot well be maintained without questioning the soundness of the decision in that case.

It might be noted that the distribution of proceeds derived from suits under so-called Lord Campbell's Acts in the various states varies greatly. There is nothing particularly sacred or vested in the provisions of our Statute directing distribution to next of kin, and our Statute conceivably works inequities in that it makes no provision for varying degrees of dependency between next of kin. For example, a wealthy child secures the same distributive share as a crippled, dependent child.

Any number of supposititious cases may be presented which would show discrimination in favor of one class of beneficiaries over another. To the list presented by plaintiff may be added another, which would illustrate the converse of the proposition urged by him, namely: Under the Statute of Distribution (Act of March 3, 1901; 31 Stat. 1250, c. 854, Sec. 377; April 19, 1920, 41 Stat. 563, c. 153;

D. C. Code 1930, Title 29, Sections 285 and 286), where there is no surviving spouse and there are children of the decedent, the children take all of the personalty equally. Under the Compensation Act a child or children eighteen (18) years of age may not receive compensation. If there be, in such a case, a father, who is dependent, he may be entitled to compensation; but he would not share in the distribution under the Statute of Distribution. Should the father in such case claim and receive compensation; and the administrator be permitted to maintain the action under the Death by Wrongful Act Statute, and distribute in accordance with its terms; then the employer would be required to pay compensation, and would not be entitled to receive any reimbursement out of the proceeds of the suit under the Death by Wrongful Act Statute. This would follow because the person receiving compensation would have no interest in any amount recovered in such suit. Such a situation is obviously contrary to the purpose and intent of Section 33 of the Compensation Act.

Apart from all this, the place for the correction of inequities and discrimination resulting from statutory rights, if any there be, is the Congress and not the Courts.

CONCLUSION.

In conclusion, therefore, it is respectfully submitted, first, that there is only one cause of action for negligence causing death in the District of Columbia; and, second, under the facts of this case this cause of action has been assigned to the employer under and by virtue of the terms of the Compensation Act. It follows that the decision of the United States Court of Appeals for the District of Columbia is the proper and correct determination of this controversy; and the plaintiff is not entitled to maintain an action gainst the defendant.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

EDWARD S. BRASHEARS,
WILSON L. TOWNSEND,
ALBERT F. BEASLEY,
Attorneys for Respondent,
Investment Bldg.,
Washington, D. C.

FILE COPY

Office Supreme Court
FILED
APR 2 19
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 574.

CHARLES M. DOLEMAN, Administrator of the Estate of Robert R. Doleman, *Petitioner*,

vs.

HARRY LEVINE, *Respondent*.

BRIEF FOR RESPONDENT.

EDWARD S. BRASHEARS,
WILSON L. TOWNSEND,
ALBERT F. BEASLEY,
Attorneys for Respondent,
Investment Bldg.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Matter Index.

Page

Statement 1

Statement of Facts 2

Questions Involved 4

Argument 5

There is only one right of action for negligence causing death in the District of Columbia..... 6

The right of action under the death by wrongful act statute has been assigned to the employer..... 10

Conclusion 16

TABLE OF CASES.

Aetna Life Ins. Co. vs. Moses, 287 U. S. 530; 77 L. Ed. 477 ..... 7, 10, 11

Arizona Employers' Liability Cases, 250 U. S. 400; 63 L. Ed. 1058 ..... 6, 14

Backus vs. Fort St. Union Depot Co., 169 U. S. 559; 42 L. Ed. 853 14

Baltimore S. S. Co. vs. Phillips, 274 U. S. 316; 71 L. Ed. 1069 9

Brannenburg vs. Ind. P. & C. R. Co., 13 Ind. 103; 74 Am. Dec. 250 10

Crowell vs. Benson, 285 U. S. 22; 76 L. Ed. 598..... 7

Cudahy Packing Co. vs. Parramore, 263 U. S. 418; 68 L. Ed. 366 6

Hunt vs. Bank Line, 35 Fed. (2d) 136..... 7, 8, 11

Kansas City M. & O. R. Co. vs. Shutt, 24 Okla. 96; 104 Pac. 51; 20 Ann. Cas. 255..... 10

Louisville & N. R. Co. vs. Mottley, 219 U. S. 467; 55 L. Ed. 297 14

Middleton vs. Texas Power etc. Co., 249 U. S. 152; 63 L. Ed. 527 14

Page

Mondon vs. New York etc. Co., 223 U. S. 1; 56 L. Ed. 327 14

Moore vs. Christensen, S. S. Co., 53 Fed. (2d) 299...7, 8, 12

Mountain Timber Co. vs. State, 243 U. S. 219; 61 L. Ed. 685 6

New York Central R. R. Co. vs. White, 243 U. S. 188; 61 L. Ed. 667 6

Storrs vs. Mech (Md. 1934), 170 Atl. 743 ..... 7, 9

U. S. Fidelity & G. Co. vs. Graham & N. Co., 264 N. Y. 50; 171 N. E. 903 7

Ward & Gow vs. Krinsky, 259 U. S. 503; 66 L. Ed. 1033 6

Wheeler Sav. Bank vs. Tracey, 141 Mo. 252; 42 S. W. 946; 64 A. S. R. 505 10

Zirpola vs. Casselman, 237 N. Y. 367; 143 N. E. 222.... 7, 8

1 Ruling Case Law 344 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 574.

CHARLES M. DOLEMAN, Administrator of the Estate of Robert R. Doleman, *Petitioner*,

vs.

HARRY LEVINE, *Respondent*.

BRIEF FOR RESPONDENT.

This is a review upon a writ of certiorari to the United States Court of Appeals for the District of Columbia.

The case involves the construction of the Longshoremen's and Harbor Workers Compensation Act, approved March 4, 1927 (U. S. C., Title 33, Chapter 18), as made applicable to employment in the District of Columbia by Act of Congress approved May 17, 1928 (D. C. Code, Title 19, Chapter 2), which will hereinafter be referred to as the "Compensation Act"; and the Act of Congress of February 17, 1885 (23 Stat. at L. 307, Chapter 126; D. C. Code 1924, Sections 1301-1303; D. C. Code 1929, Title 21), which is a statute providing for liability for negligence causing death, and

which will hereinafter be referred to as the "Death by Wrongful Act Statute".

STATEMENT OF FACTS.

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, his father, Charles M. Doleman, and a brother, as his heirs at law and next of kin.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, who alleges to have been partially dependent upon Robert R. Doleman, filed an election under the Compensation Act to proceed against the third party (Harry Levine) alleged to be responsible for the death of Robert R. Doleman.

On November 1, 1933, Charles M. Doleman, as the administrator of the Estate of Robert R. Doleman (hereinafter referred to as the "administrator"), filed a suit in the Supreme Court of the District of Columbia against Harry Levine. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant, acting by and through an agent, servant and employee, negligently caused the death of Robert R. Doleman; and the plaintiff claimed damages in the amount of Ten Thousand ($10,000) Dollars therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer") filed a suit in the Supreme Court of the District of Columbia against Harry Levine. The declaration proceeded to state a cause of action under the death by wrongful act statute, assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant and employee, negligently caused the death of Robert R. Doleman; and the plaintiff claimed damages in the sum of Ten Thousand ($10,000) Dollars therefor.

The defendant Harry Levine filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The administrator and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the Court. The Court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the administrator's action. Opinions of the Court were published in 62 W. L. R. 77, 78.

The administrator, after obtaining leave of Court, filed an amended declaration, in which he added an allegation that Charles M. Doleman was a dependent of the deceased; and counsel stipulated that the plea in abatement, the demurrer to the plea in abatement, and the ruling of the Court on the demurrer to the plea in abatement should stand with the same force and effect to the amended declaration as they did to the original declaration. Then the administrator elected to stand upon his demurrer to the plea in abatement; and a judgment was entered abating the action.

From this judgment the administrator noted and perfected an appeal to the United States Court of Appeals for the District of Columbia.

The case was duly presented to the United States Court of Appeals for the District of Columbia, and that Court rendered a decision affirming the judgment of the Supreme Court of the District of Columbia.

The administrator petitioned this Court for a writ of certiorari; and this Court granted certiorari.

QUESTIONS INVOLVED.

The errors alleged to have been committed by the Supreme Court of the District of Columbia in abating the administrator's suit were assigned by the petitioner and appear in the record. The primary question, of course, is whether or not the administrator, under the facts of this case, has the right to maintain the action against the respondent for the alleged negligence causing the death of Robert Doleman.

It would seem, in view of the provisions of the Compensation Act, that this question depends in the main upon whether or not there has been a valid election to accept compensation, which would operate as an assignment of the cause of action to the employer.

This Court has already ruled, in the case of *Aetna Life Insurance Company* vs. *Moses*, hereinafter referred to, that the employer is a proper party to maintain an action for negligence causing death. In this case the only difference is that there is more than one heir at law and next of kin, and the father claims to be also a dependent of the deceased; whereas in the Moses case the widow was both the personal representative and the only person entitled to compensation, according to the record. The United States Court of Appeals in this case has ruled, in effect, that where *any* dependent elects to and does receive compensation under the Compensation Act, there is an assignment of the

entire cause of action under the death by wrongful act statute to the employer.

The petitioner is seeking, upon this review, a reversal of the decision of the United States Court of Appeals for the District of Columbia, and a ruling that the administrator is the proper party to maintain the action in question.

The petitioner also urges certain discriminations and inequities which, he contends, will result from the decision of the lower Court. The respondent feels that such discriminations and inequities, if any there be, are merely collateral and do not control the real question involved, namely that of statutory construction.

ARGUMENT.

At the outset of the argument the respondent desires to state that he has been named as defendant and served with process in two separate suits, each of which claims damages from him for the same alleged negligent act resulting in the death of Robert Doleman. Primarily, the respondent's position is that the right of action for negligence causing death is a single action, which cannot be split; and, before being put to his defense on the allegations of negligence, he is entitled to a decision finally determining which of the two suits that have been filed he must answer and defend. Having been served with process in both suits, and being required to appear and answer each case, and having no preference as between the two suits filed, the respondent filed a plea in abatement in each suit, asserting in each plea that the other suit was properly brought and that the suit in which the plea was filed should abate.

The argument hereinafter will therefore be divided into two subdivisions, in the first of which the respondent will support his primary position that he should be required to defend only one action, and in the second will support his plea in abatement in this case that the suit by the employer was the only proper and valid suit which could be maintained under the facts of this case.

There is Only One Right of Action for Negligence Causing Death in the District of Columbia.

The right to maintain an action and to recover damages for negligence causing death is solely statutory, and did not exist at common law. In the District of Columbia, such a right is expressly created by the death by wrongful act statute, which provides that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death".

This is the only right of action for negligence causing injury to the person, which survives after the death of the injured person. Apart from the fact that such a right must be created by statute, it is expressly provided by Section 31 of Title 24 of the D. C. Code 1929 (Act of March 3, 1901; 31 Stat. 1227, c. 854, sec. 235) that no right of action for an injury to the person, except as provided in Title 21 of the Code, shall survive the death of such person.

The Compensation Act, similar in nature and purpose to the compensation laws in the various states, was designed to regulate the rights and liabilities between employer and employee. A burden is thereby placed upon an employer to secure compensation for an injury or death resulting from an accident without regard to fault or negligence on the employer's part. It is in effect a charge upon the industry or business in which the employer and the employees in any case are engaged; and upon that theory has been held to be constitutional. See:

New York Central R. R. Co. vs. *White*, 243 U. S. 188; 61 L. Ed. 667.

Ward & Gow vs. *Krinsky*, 259 U. S. 503; 66 L. Ed. 1033.

Arizona Employer's Liability Cases, 250 U. S. 400; 63 L. Ed. 1058.

Mountain Timber Co. vs. *State*, 243 U. S. 219; 61 L. Ed. 685.

Cudahy Packing Co. vs. *Parramore*, 263 U. S. 418; 68 L. Ed. 366.

It is limited in its application to cases involving the relationship of employer and employee, or master and servant. See:

Crowell vs. *Benson*, 285 U. S. 22; 76 L. Ed. 598.

The Compensation Act makes provision for certain rights of the employer in cases where the injury to an employee was caused by negligence of a third party. These provisions are found in Section 33 of the Act; and a casual reading of Section 33 discloses that such right or rights, as are acquired by the employer, are by way of assignment. The manifest purpose of this section is to give to the employer some right or opportunity of obtaining reimbursement, when he has been required to pay compensation because the injury occurred to the employee during the course of the employment, where the injury was occasioned by the negligence of a third party.

The Compensation Act did not create a new cause of action for negligence causing death.

Aetna Life Insurance Company vs. *Moses*, 287 U. S. 530, 77 L. Ed. 477.
Hunt vs. *Bank Line*, 35 Fed. (2nd) 136.
Moore vs. *Christensen S. S. Co.*, 53 Fed. (2nd) 299.
Zirpola vs. *Casselman*, 237 N. Y. 367, 143 N. E. 222.
U. S. Fidelity and Guaranty Company vs. *Graham and Norton Company*, 254 N. Y. 50, 171 N. E. 903.
Storrs vs. *Mech* (Md. 1934), 170 Atl. 743.

In the case of *Aetna Life Insurance Company* vs. *Moses, supra*, this Court, in dealing with the Compensation Act and the death by wrongful act statute in question here, rejected the idea that the compensation law created any new cause of action for negligence causing death. In its opinion this Court said:

"In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the em-

> ployer the full right to recover damages from the third person. Double recovery by the employee * * * is thus avoided. * * *
>
> "In this case the injury resulted in the death of the employee and the election to take compensation was made by the widow. * * * Her election has called into operation the statutory assignment so far as it applies to the action for wrongful death. We must decide its effect on that cause of action."

In the case of *Hunt* vs. *Bank Line, supra,* the Circuit Court of Appeals for the Fourth Circuit, in a case under the Longshoremen's Act, held that upon acceptance of compensation an employee could not thereafter sue the third party whose negligence caused the injury, even though the employer refused to bring such a suit, as the entire right of action passed to the employer.

In the case of *Moore* vs. *Christensen S. S. Company, supra,* the Circuit Court of Appeals for the Fifth Circuit, in affirming a decision of the District Court denying the right of the administrator of a deceased longshoreman to sue the third party whose negligence allegedly caused the death, said:

> "It is not to be supposed that for the same injury or death two actions against the same party were contemplated, one under the state law and another under the Act of Congress."

In *Zirpola* vs. *Casselman, supra,* the New York Court, in construing the New York Workmen's Compensation Law, which incidentally was the model used in drafting the Longshoremen's Act, said:

> "The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the

dependents should be applied in reduction of the burdens that were placed upon the carrier."

In the very recent case of *Storrs* vs. *Mech, supra,* the Court of Appeals of Maryland, in deciding a case involving construction of the death statute and the provisions of the workmen's compensation law relative to actions where an employee is killed, said:

> "In other words, section 58 of Article 101 does not create any new liability, but simply designates in what manner the liability theretofore existing under the common law and Lord Campbell's Act, should be enforced, and changes the parties who might be benefited by such enforcement.
>
> * * * * * * * * *
>
> "There is nothing in conflict between the provisions of Article 67, 'Lord Campbell's Act', and Article 101 'Workmen's Compensation'. They both unquestionably deal with recovery for injuries resulting in death. The two statutes are in *pari materia* and must be construed together."

The opinion of the United States Court of Appeals in this case held that the most casual reading of the Act necessarily excluded any assumption that the third party would be subjected to separate and independent suits for the same cause of action. Indeed, it is not urged that the Compensation Act creates any new and separate cause of action against an alleged third party wrongdoer; and counsel for the respondent have been unable to find any case in which any Court has held that such a law created any such new cause of action. All of the authorities that have been found either expressly hold, or assume, that there is but one cause of action for negligence causing death.

Generally, a single wrongful or negligent act can give rise to but one cause of action in tort.

1 Ruling Case Law 344.
Baltimore Steamship Co. vs. *Phillips,* 274 U. S. 316; 71 L. Ed. 1069.

Brannenburg vs. *Indianapolis P. & C. R. Co.*, 13 Ind. 103; 74 Am. Dec. 250.
Wheeler Sav. Bank vs. *Tracey*, 141 Mo. 252; 42 S. W. 946; 64 A. S. R. 505.
Kansas City M. & O. R. Co. vs. *Shutt*, 24 Okla. 96; 104 Pac. 51; 20 Ann. Cas. 255.

Since there is, and can be, only one cause of action for negligence causing death, the sole question presented in this case is the question of who is the proper party to maintain the action.

The Right of Action Under the Death by Wrongful Act Statute Has Been Assigned to the Employer.

The question as to who is the proper party to maintain the action becomes one of statutory construction. The question of whether, under the facts of this case, the cause of action against the third party alleged wrongdoer has been assigned to the employer depends upon the construction of Section 33 of the Compensation Act.

It is perfectly clear from reading the provisions of Section 33 that when the employee is injured by reason of the alleged negligence of the third party, and the employee accepts compensation, the right of action is assigned to the employer. When the injury results in the death of the employee, the statute is not so clear, and may well be said to be ambiguous, particularly by reason of the use of the words "of the person entitled to compensation". However, by reading together the various sub-paragraphs, it is apparent that the Act contemplates the same result in a case where death results as in a case of injury without death to the employee, namely, that when the employer is required under the Compensation Act to pay compensation the right of action against the third party alleged wrongdoer shall be assigned to him.

Section 33 was involved in the case of *Aetna Life Insurance Company* vs. *Moses, supra*, and was construed by this

Court. In that opinion, and after discussing the various sub-paragraphs of Section 33, this Court said:

> "Having regard to these provisions and to the general purpose which the Act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former."

The provisions in Section 33 (c) for payment of any surplus recovered by the employer constitute the vital difference between this statute and the New York Statute, under which the New York cases relied upon by the petitioner arose. The New York statute contains no provision for payment of a surplus recovery by the employer to anyone.

The Circuit Court of Appeals for the 4th Circuit, in the case of *Hunt* vs. *Bank Line, supra,* points out this distinction, and states that while the statute seems to be modeled after the New York Statute the assignment clause differs; that in New York the employer keeps the balance, and the Federal Act doubtless sought to avoid this.

This Court, in the *Aetna* vs. *Moses* case, also recognized this distinction between the New York Statute and the Federal Act, stating on page 540 of the opinion:

> "For if it had been intended that the employer should assert only a part of the action for wrongful death, proportionate to the interest of those who are dependents under the Compensation Act, compare *Zirpola* v. *F. & E. Casselman,* 237 N. Y. 367, 143 N. E. 222; *United States Fidelity & G. Co.* v. *Graham & N. Co.,* 254 N. Y. 50, 171 N. E. 903, there would be no meaning to the language of sec. 33 (2) directing him to pay to

> the personal representative from the proceeds of the action any excess over the compensation award."

In the case of *Moore* vs. *Christensen S. S. Company, supra,* the Court further stated in its opinion that:

> "It clearly was the intent of Congress to assign to the employer all rights of the legal representative of the deceased, and also to enumerate the classes of the beneficiaries on whose behalf recovery might be had."

In this case we are concerned with a question of what person, or legal entity, is vested with the authority and right to maintain an action against the third party alleged wrongdoer for negligence causing death. The respondent in this case is not concerned with questions of equities between next of kin or dependents, or with distribution of the proceeds of a recovery. Those questions may be settled and determined by the parties claiming an interest therein, after the liability of the third party is determined. Obviously, the question of distribution of proceeds from recovery cannot arise unless the negligence question has been voluntarily settled or has been determined adversely to the third party and a judgment has been rendered against him.

The law, therefore, should be settled as to who is the proper person to institute and maintain such an action; or, otherwise, any third party, charged with negligence in connection with the death of an employee, would be unable to determine the person with whom he could, if he desired, settle or compromise the claim, nor would he know whose suit he might properly be called upon to defend.

The question of who is the proper person to maintain the action against the third party depends upon whether or not there was a valid election to accept compensation, which, under the terms of Section 33 of the Compensation Act, transferred the right of action to the employer.

In the light of the decision of this Court in the case of *Aetna Life Insurance Company* vs. *Moses, supra,* it is sub-

mitted that the decision of the United States Court of Appeals for the District of Columbia in this case, in which it was held that the employer, having paid compensation to the widow, is entitled to recover the amount paid, and that the right to recover part is the right to recover all, and further that where any beneficiary elects to take compensation the employer has the exclusive right to bring the action, is the correct and proper construction of the Compensation Act and is the correct and proper determination of the question as to who may maintain the action.

The petitioner, in his brief, goes into great length to discuss certain inequities and discrimination in the distribution of the proceeds of a successful suit that would result from the decision that has been rendered in this case.

It would seem that the petitioner complains that, by holding that the right of action is assigned to the employer, the method of distribution of the proceeds of the litigation is changed from that which is set out in the death by wrongful act statute, and that he is thereby being deprived of certain vested rights under the death by wrongful act statute. The Compensation Act was in force long before the happening of the accident which resulted in the death of the decedent; and the plaintiff had no vested interest of which he could be deprived.

The right of action for negligence causing death is not an asset of the estate of the decedent, recovery under any such action is not subject to the debts of the decedent, and the provisions of the statute, providing for distribution to next of kin, are merely a convenient method for distribution of damages and do not create any vested interest in any estate.

It is submitted there are no vested rights in the method of distribution of damages received under a death statute. There are no vested rights in existing law which preclude its change or repeal. See:

Louisville & N. R. Co. vs. *Mottley*, 219 U. S. 467; 55 L. Ed. 297.
Mondou vs. *New York, etc. Co.*, 223 U. S. 1; 56 L. Ed. 327.
Backus vs. *Fort St. Union Depot Co.*, 169 U. S. 559; 42 L. Ed. 853.
Middleton vs. *Texas Power, etc. Co.*, 249 U. S. 152; 63 L. Ed. 527.
Arizona Employers' Liability Cases, 250 U. S. 400; 63 L. Ed. 1058.

It would seem beyond argument that, since the right of action for negligence causing death is purely statutory, the Congress has the power to and may change the provisions of the death by wrongful act statute, and may set up a different method of distribution of the proceeds of such a suit, or may provide for a new class of beneficiaries. Dependents may properly be given a preference over next of kin. It may well be said that Congress has, by the enactment of the Compensation Act, changed the method of distribution under the death by wrongful act statute in any case in which the Compensation Act is also drawn into operation by proceedings thereunder. Such was the situation in the case of *Storrs* vs. *Mech*, *supra*, in which the Maryland Court of Appeals held that the Workmen's Compensation Law in Maryland had amended the Lord Campbell's Act whenever applicable by setting up a new class of beneficiaries.

The petitioner concedes that under the facts of the *Aetna* case, *supra*, the right of action was validly assigned to the employer. Does not this destroy most of his argument about the injustice of next of kin being barred, or their distributive share being diminished by reason of such assignment? In the Aetna case there might have been several next of kin, not dependents, who would have suffered all of the inequities and discrimination he sets forth, yet he concedes that there was a proper transfer; and it would therefore seem that the argument advanced cannot well be

maintained without questioning the soundness of the decision in that case.

It might be noted that the distribution of proceeds derived from suits under so-called Lord Campbell's Acts in the various states varies greatly. There is nothing particularly sacred or vested in the provisions of our statute directing distribution to next of kin, and our statute conceivably works inequities in that it makes no provision for varying degrees of dependency between next of kin. For example, a wealthy child secures the same distributive share as a crippled, dependent child.

Any number of supposititious cases may be presented which would show discrimination in favor of one class of beneficiaries over another. To the list presented by petitioner may be added another, which would illustrate the converse of the proposition urged by him, namely: Under the Statute of Distribution (Act of March 3, 1901; 31 Stat. 1250, c. 854, sec. 377; April 19, 1920, 41 Stat. 563, c. 153; D. C. Code, Title 29, Sections 285 and 286), where there is no surviving spouse and there are children of the decedent, the children take all of the personalty equally. Under the Compensation Act a child or children eighteen (18) years of age may not receive compensation. If there be, in such a case, a father, who is dependent, he may be entitled to compensation; but he would not share in the distribution under the Statute of Distribution. Should the father in such case claim and receive compensation; and the administrator be permitted to maintain the action under the death by wrongful act statute, and distribute in accordance with its terms; then the employer would be required to pay compensation, and would not be entitled to receive any reimbursement out of the proceeds of the suit under the death by wrongful act statute. This would follow because the person receiving compensation would have no interest in any amount recovered in such suit. Such a situation is obviously contrary to the purpose and intent of Section 33 of the Compensation Act.

Apart from all this, the place for the correction of inequities and discrimination resulting from statutory provisions, if any there be, is the Congress and not the Courts.

CONCLUSION.

In conclusion, therefore, it is respectfully submitted, first, that there is only one cause of action for negligence causing death in the District of Columbia; and, second, under the facts of this case this cause of action has been assigned to the employer under and by virtue of the terms of the Compensation Act. It follows that the decision of the United States Court of Appeals for the District of Columbia is the proper and correct determination of this controversy; and the petitioner is not entitled to maintain an action against the respondent.

WHEREFORE, it is respectfully submitted that the decision of the United States Court of Appeals in this case should be affirmed.

EDWARD S. BRASHEARS,
WILSON L. TOWNSEND,
ALBERT F. BEASLEY,
Attorneys for Respondent,
Investment Bldg.,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 574.—October Term, 1934.

Charles M. Doleman, Administrator of the Estate of Robert H. Doleman, Deceased, Petitioner,
vs.
Harry Levine.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 29, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

In this case, certiorari was granted, — U. S. —, to resolve doubts as to the construction of § 33 of the District of Columbia Compensation Act (Longshoremen's & Harbor Workers Compensation Act, c. 509, 44 Stat. 1424, 33 U. S. C., §§ 901 *et seq.*, made applicable to the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600).

Doleman, petitioner's intestate, in the course of his employment within the District, was struck by the automobile of respondent and received injuries which caused his death. He left surviving him his widow, and, as his heirs at law and next of kin, a brother and a dependent father, who is his administrator. The widow elected to receive compensation from the employer under the provisions of the Compensation Act. The father elected not to receive compensation and brought the present suit as administrator to recover for the death under the provisions of the Wrongful Death Act of the District. Code of Law for the District of Columbia, Title 21, §§ 1-3. A like suit, brought by the employer against the respondent, is also pending. The Supreme Court of the District gave judgment for the defendant, sustaining a plea in abatement which set up the pendency of the suit brought by the employer and that the right to recover for the wrongful death had been assigned to the employer by operation of the provisions of the Compensation Act. The Court of Appeals affirmed, 73 F. (2d) 842, relying in part on its construction of the relevant provisions of § 33 of the Compensation Act and in part on our decision in *Aetna Life Insurance Co.* v. *Moses*, 287 U. S. 530.

The Compensation Act establishes a scheme for compensation of an injured employee by the employer, and for the payment of benefits to a specified class of his dependents when the injury causes death. Where some person other than the employer is liable for damages for the injury, compensation is governed by § 33.[1] Section 33 (a) authorizes "the person entitled to such compensation" to elect to receive compensation or to recover damages "against such third person," and § 33 (b) provides that acceptance of such compensation "shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

In *Aetna Life Insurance Co.* v. *Moses, supra,* the widow of an employee who was killed in the course of his employment, and who was also his administratrix and the sole beneficiary under both the

---

[1] "Sec. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

"(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'represntative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

"(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

"(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative. . . ."

Compensation and the Wrongful Death Acts, elected to receive compensation. It was conceded that the widow, before her election, was alone entitled to the benefit of the Wrongful Death Act, and the question was who, in consequence of her election, was the proper plaintiff to bring the action. This Court held, construing § 33 (a) and (b), that the Compensation Act, called into action by her election, operated to transfer to the employer all her right of recovery under the Wrongful Death Act. Since the transfer of her entire interest was effected by § 33 (b), which in terms declared that acceptance of compensation by the dependent "shall operate as an assignment," we thought that a complete and unqualified transfer was intended, which would authorize the employer to maintain the suit in his own name, without necessity of suing in the name of the administratrix as in the case of an assignment of a chose in action at common law.

Similarly, § 33 (c) provides in terms for the transfer to the employer of "all right of the legal representative" of the deceased employee to recover for the wrongful death, where the deputy commissioner for the compensation district determines that there is no person under the Compensation Act entitled to compensation, and the employer makes the payment of $1,000 into the special compensation fund as prescribed by § 44.

A different question is presented where the dependent who has elected to receive compensation is entitled to only a partial interest in the amount to be recovered for the death. Such is the case here. For the widow alone has elected to take compensation, and under the Wrongful Death Act, § 3, the proceeds of the recovery are required to be distributed among the next of kin, which includes both the widow and the father, where the decedent leaves no surviving child. Title 29, D. C. Code, §§ 284, 285, 288.

The right of the employer to reimbursement from the recovery is derived from his subrogation, under § 33 (b) of the Compensation Act, to the rights of the dependent widow to whom he is bound to pay compensation. Apart from statute, the indemnitor's right by subrogation to stand in the place of his indemnitee, who is entitled to a part only of the proceeds of a single cause of action, does not carry with it any authority to maintain the action in his own name. See *Mandeville* v. *Welch*, 5 Wheat. 277, 286; *Shankland* v. *Washington*, 5 Pet. 390; *Vinal* v. *West Virginia Oil & Oil Land Co.*,

110 U. S. 215. He is in the position of a partial assignee of the chose in action, and as such is entitled to his share of the proceeds of the action when recovered and may secure their recovery by resort to equity, in a suit joining proper parties, to compel action by the legal owner and appropriate distribution of the proceeds. See *Peugh* v. *Porter*, 112 U. S. 737, 742; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, 644; *Aetna Life Insurance Co.* v. *Moses, supra*, 542, n. 3.

Section 33 (b) purports only to assign to the employer "all right of the person entitled to compensation to recover damages against such third person." It operates to transfer to the employer only such rights as the dependent has. We do not doubt that this section, interpreted in the light of the indemnitor's common law right of subrogation, confirms that right and is sufficient to give the employer as indemnity all the rights which the dependents electing to receive compensation otherwise would have to share in the benefits of the Wrongful Death Act. If they are entitled to the whole recovery, the employer may maintain the suit as in *Aetna Life Insurance Co.* v. *Moses, supra.* If their interest is less than the whole, the employer is entitled to receive their share in the proceeds of recovery and, if necessary, by appropriate proceedings to compel the administrator to bring the suit and account for its proceeds. But the section does not purport to split the cause of action. A purpose to do violence to the firmly grounded tradition of the unity of a cause of action at law, by casting on the defendant the burden of defending two suits, is hardly to be implied. See *Mandeville* v. *Welch, supra.*

Nor, on the other hand, does the language of the section admit of a construction which would operate to transfer rights in the chose in action which the dependent electing to receive compensation did not have, or to confer upon the employer the benefit of any part of the proceeds of the recovery for wrongful death which the dependent receiving compensation could not have demanded. If § 33 (d) and (e) refer, as the court below thought, to an assignment to the employer in the circumstances mentioned in § 33 (b) as well as in § 33 (c), they do not support any construction of § 33 (b) different from that already indicated. Section 33 (d) authorizes the employer "on account of such assignment," to compromise the claim for damages or to institute proceedings upon it.

Its provisions are permissive only. It would plainly sanction a compromise or a suit by the employer in the case where the injury did not result in death or where, as in *Aetna Life Insurance Co.* v. *Moses, supra,* the entire interest in the right to recover is vested in the employer by operation of § 33 (b). But in a case like the present, where the right assigned to the employer is to receive a part only of the proceeds of recovery for the wrongful death, the language falls short of conferring upon him authority to compromise or sue upon claims which "such assignment" does not operate to transfer. This conclusion is supported, if not compelled, by the clause of § 33 (a), which authorizes a dependent[2] of the deceased employee to elect whether to receive compensation or to recover damages against a third person, and by § 33 (e), which gives to the employer as indemnity the full benefit of "any amount recovered" by him, before turning over the balance to the personal representative of the deceased. There may be next of kin of the decedent entitled to share in the recovery for wrongful death who are not entitled to compensation, and others who elect, as provided in § 33 (a) to take their share of the recovery for wrongful death instead of compensation. A construction of § 33 which would require the use of their shares to indemnify the employer, for payments to others who have elected to receive compensation, is not to be favored in the absence of language plainly requiring it.

It is true that in the case where the injury causes the death of an employee having no dependents, and the employer pays $1,000 into the special compensation fund as required by § 44, the right of the legal representative to recover for the wrongful death is in terms assigned by § 33 (c) to the employer who is authorized by § 33 (e) to indemnify himself from the proceeds of recovery. Whatever purpose may have inspired these provisions of § 33 (c),[3] explicitly limited to the single case of the payment by the employer of the $1,000 into the special fund, we can find in them no war-

[2]Section 33 (a) gives the election to "the person entitled to such compensation," and makes no express provision for the case where there is more than one dependent. Since the statute preserves to "the" dependent the right of election to recover damages against the third person, and does not in terms give one dependent the right to elect for all, it must be deemed to give each dependent the right of election independently of the others, and the phrase "the person entitled to such compensation" must be taken to mean each or any dependent.

[3]It is to be noted that in the case of assignments under § 33 (c) indemnity to the employer cannot be at the expense of the dependents of the deceased.

rant for giving to § 33 (b) a construction which its language does not admit and which would authorize the employer to indemnify himself for payments to dependents, not necessarily limited to $1,000, at the expense of the next of kin who receive no benefit of the compensation payments.

We conclude that where the employer is given anything to recover by a suit brought directly against the wrongdoer, it is the full recovery to which the injured employee or his personal representative would be entitled. See *Aetna Life Insurance Co.* v. *Moses*, *supra*, 540. But where the right of the dependent, to which the employer is subrogated by § 33 (b), is only to a share of the proceeds of the recovery, the employer is not authorized to maintain the action for wrongful death. As statutory assignee of the rights of the dependent receiving compensation, he acquires only the rights of his assignor to compel the executor or administrator, by appropriate proceedings, to maintain the suit and to share in the proceeds of the recovery.[4]

While it seems beyond the resources of judicial ingenuity to construe the statute so as to give it a wholly consistent and harmonious operation, we think the construction which we adopt conforms to its language and to the principles of the common law, in the light of which it must be interpreted. It does not deny to the employer subrogation to the rights, of those dependents receiving compensation, to share in the recovery for wrongful death, but it leaves undisturbed the rights of the next of kin who, as § 33 (a) permits, elect to receive the benefits of the Wrongful Death Act rather than compensation.

Reversed.

---

[4] A like construction has been given to the similar, but not identical, compensation statute of New York. If the persons receiving compensation do not include all of the next of kin who are beneficiaries under the Wrongful Death Act, the employer or insurance carrier must prosecute his claim to share in the proceeds through the administrator as statutory trustee, and may compromise or release his own interest, but no other. United States Fidelity & Guaranty Co. v. Graham & Norton Co., 254 N. Y. 50, 53; Matter of Zerpola v. Casselman, Inc., 237 N. Y. 367, 375. But if all of the next of kin entitled to receive the benefit of the recovery for wrongful death elect to receive compensation, the employer or insurance carrier may maintain the action against the wrongdoer. See Matter of Zerpola v. Casselman, Inc., *supra*, 373; Travelers Insurance Co. v. Padula Co., 224 N. Y. 397.